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JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 2021. The petition for a writ of certiorari was filed on August 27, 2021, and was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

From October 2018 through September 2020, there were a total of ten medical facilities in and around Florida—including the Fresh Prince Medical Center—reported break-ins. On September 6, 2020, respondents allegedly entered the Fresh Prince Smith Medical Center brandishing firearms. Once granted access, the men began ransacking the hospital's reserves of narcotics, including, but not limited to, morphine, codeine, and paracetamol. It has been well established that the drugs stolen are commonly used to break down heroin. Next, the men walked Dr. Banks into the parking lot, knocked her unconscious, and left her in a maintenance closet of the garage. Security camera footage of the garage entrance showed a dark Dodge Charger fleeing the scene shortly after with three men inside the car.

In October 2020, FBI Agent Michael Lowry, along with his team, connected five robberies by the Modus Operandi: two men would enter a hospital, find a doctor, clear out the medical supplies, and a third man would keep the car running as the getaway driver. In all five robberies, the car the perpetrators used to flee was a black Dodge Charger. In December 2020, there was a break in the case when the getaway driver Michael Kyle, aka Junior, was arrested on an unrelated charge. Junior made a deal with the Attorney General's Office to give them information on the five robberies he knew about in exchange for a lesser sentence. When Junior was arrested, he was in possession of two 9-millimeter pistols and a shotgun. Fingerprints of two other men were identified on the 9 millimeters and are believed to be the prints of the respondents. Junior provided the names of his co-conspirators, Cole Brown and Jazz Jefferies (Respondents), and the two were immediately arrested and charged with Conspiracy to Commit Armed Robbery and five Counts of Armed Robbery.

SUMMARY OF ARGUMENT

The respondents' prior felony convictions of attempt and conspiracy qualify as predicate offenses under § 4B1.1 for purposes of the Career Offender Status. In 1995 the Sentencing Commission amended Application Note 1 of the Sentencing Guidelines without change to repromulgate that the guideline instructed judges to

interpret inchoate offenses like attempt and conspiracy as predicate offenses when determining Career Offender Status. *Stinson v. United States,* and *United States v. Price*—the cases cited by the respondents as evidence of err on the part of the District Court Judge—were both litigated prior to the 1995 amendment repromulgating Application Note 1. The amendment affirms that Judge Banks acted in accordance with the guidelines when issuing the respondents' sentencing.

The Sentencing Guidelines' commentary plays a significant and imperative role in ensuring that consistent sentencing is imposed for similar crimes. Commentary is therefore considered binding and authoritative unless it directly contradicts the guidelines, contains a constitutional violation, or violates a federal statute. U.S.S.G. § 1B1.7. The commentary at issue meets none of the aforementioned criteria for disqualification and should therefore be considered authoritative and binding. The District Court properly relied on the commentary when determining respondents' Career Offender Status. Courts routinely interpret attempt and conspiracy offenses as predicate offenses under § 4B1.1 for purposes of the Career Offender Status. In *United States v. Rodriguez-Rivera, United States v. Chavez, United States v. Lightbourn*, and *United States v. Lewis,* Circuit Courts held that previous felony convictions of attempt and conspiracy qualified as controlled substances offenses. Additionally, in *Rodriguez-Rivera* the Appellate Court held that the elements that comprise a conspiracy offense outlined in 21 U.S.C. § 846 were synonymous with the meaning of conspiracy under U.S.S.G. § 4B1.1. Furthermore, judges have routinely looked to Commentary for definitional guidance because, to maximize efficiency within the Sentencing Guidelines, the Commission nests definitions therein. Finally, to promote the principles of fairness and justice, the Supreme Court should rely on precedent established by the U.S. circuit courts of appeals.

ARGUMENT

I. Attempt and conspiracy offenses qualify as predicate offenses under § 4B1.1 for the purposes of the Career Offender Status.

A. The 1995 amendment to § 4B1.1 affirms the legitimacy of the sentencing guidelines commentary.

According to the United States Sentencing Guidelines (U.S.S.G.) § 4B1.1: (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at

the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. 4B1.1. In 1995 the Commission on Sentencing Guidelines made an amendment repromulgating without change Application Note 1 of the commentary to § 4B1.2 (Definition of Terms Used in § 4B1.1). U.S.S.G. § 4B1.2.

The 1995 amendment to § 4B1.2 repromulgated Application Note 1 of the commentary at issue in the current matter. The commission noted that the amendment, "responds to a decision by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Price,* 990 F.2d 1367 (D.C.Cir.1993)." U.S.S.G. § 4B1.2. In *Price,* the court neglected to apply the career offender guideline to a defendant formerly convicted of a drug conspiracy because 28 U.S.C. § 994 —the enabling mandate which the commission cites—does not explicitly refer to inchoate offenses. U.S.S.G. §4B1.2. The 1995 amendment made by the commission was a reaffirmation of their intent for inchoate offenses like attempt and conspiracy to be qualified as predicate offenses under § 4B1.1 for the purposes of the Career Offender status.

The 1995 amendment to the commentary used by Judge Banks is a direct response to the issue the respondents have presented to the court. It proves that the District Court Judge did not err when referencing the commentary to determine that the respondent's prior convictions fall within the parameters of "Controlled Substance Offenses." The respondents cite the Supreme Court's holding that where "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Stinson v. United States*, 508 U.S. 36, 43, (1993). The court's 1993 ruling in *Stinson* ought to be reaffirmed. A reaffirmation of the decision in *Stinson* would affirm this court's belief that the Sentencing Commission's 1995 repromulgation of Application Note 1 established that the commentary at issue and the guideline it interprets are in no way inconsistent with each other.

Respondents cite *Price* in an effort to exemplify the appellate court's repudiation of instances in which defendants have been provided with extended

sentences stemming from judicial interpretation of commentary that is inconsistent with sentencing guidelines. It is imperative to highlight that the 1995 amendment to Application Note 1 of the commentary to § 4B1.2 directly "responds to [the] decision by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Price,* 990 F.2d 1367 (D.C.Cir 1993)." U.S.S.G. 4B1.2. When the Commission established the 1995 amendment, they did so without changing any of the Application Note's contents. The express purpose of the amendment was to respond to the court's ruling in *Price* and provide further clarification regarding the Commission's intent. The Commission intended for Application Note 1 of the commentary to § 4B1.2 to include inchoate offenses like attempt and conspiracy as qualifying predicate offenses under § 4B1.1 for the purposes of the Career Offender status. Furthermore, the *Price* court found that the enabling legislation of 28 U.S.C. § 994 (h) mandates for the Commission to assure that "Career Offenders, as defined in the statute" receive a sentence at or near the maximum and uses § 4B1.1 to implement this mandate. *Price,* 990 F.2d at 1369. We believe the court's findings in *Price* with reference to 28 U.S.C. § 994 (h) demonstrate that according to statutory provisions, Judge Banks acted in accordance with the law when applying the Career Offender guidelines to the respondents sentencing.

Thus, the 1995 amendment to § 4B1.1 affirms that the commentary related to the Sentencing Guidelines in § 4B1.1 is not in conflict with the intention of the sentencing guidelines for career offenders.

B. Sentencing Commentary is an imperative aspect of Sentencing Guidelines

USSG, § 1B1.7, "Significance of Commentary," underscores the importance of the Commentary in informing judges' sentencing decisions. The section states that there are three primary purposes served by the Commentary: (1) to interpret the guideline or explain how it is to be applied; (2) to suggest circumstances which, in the view of the Commission, warrant departure from the guidelines; and (3) to provide background information to be considered when enforcing the guidelines. U.S.S.G. § 1B1.7. Commentary is to be interpreted as the legal equivalent of a policy statement and failure to comply with Commentary could result in the incorrect application of the guidelines. U.S.S.G. § 1B1.7. The risk of an incorrect application of the guidelines

endangers judicial efficiency and may result in subjecting sentences to reversal on appeal.

In the instant matter, an affirmation of the sentencing calculation issued by the district court judge is an affirmation of the importance of Sentencing Commentary within the United States Judicial System. In *Stinson,* the court held that the Guideline Manual's commentary, which interprets or explains a guideline, is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. *Stinson v. United States*, 508 U.S. 36, (1993). The commentary leveraged by Judge Banks in his sentencing decision should be considered authoritative because it does not violate any statutes, nor does it present an inconsistent or erroneous interpretation of the sentencing guideline. Judge Banks' usage of the commentary in the instant matter was in exact alignment with the Commission's intended use. He leveraged the commentary to aid his interpretation and application of the Sentencing Guideline, one of the three primary purposes of commentary as noted in USSG, § 1B1.7, "Significance of Commentary."

Therefore, the commentary to § 4B1.1 should be considered binding and effectively leveraged in the instant matter.

II. Courts routinely consider attempt and conspiracy offenses as predicate offenses for the purposes of career offender status.

A. Conspiracy and attempt to commit a crime involving a controlled substance are considered controlled substance offenses under U.S.S.G. § 4B1.1.

According to 21 U.S.C. § 846, the crime of conspiracy has three elements: (1) on or before the date two or more persons reached an agreement or came to an understanding to commit an offense; (2) the defendant voluntarily and intentionally joined in the agreement or understanding either at the time it was first reached or at some later time while still in effect; and (3) at the time the defendant joined in the agreement or understanding they knew the purpose of the agreement or understanding. Conspiring under 21 U.S.C § 846 is considered to have the same meaning as conspiring within the commentary of U.S.S.G. § 4B1.1 as demonstrated in *United States v. Rodriguez-Rivera.* 989 F.3d at 183. In *Rodriguez-Rivera* the First Circuit Court of Appeals concluded that it was unable to identify anything sufficient

to overpower the strong sense that conspiring under section 846 of the Controlled Substances Act was one of the many offenses the Sentencing Commission had in mind when stating, in Application Note 1, that the offense of conspiring to commit a controlled substance offense is a controlled substance offense. *Id*. Likewise, in *United States v. Chavez,* a case in which the defendant objected to being classified as a career offender, arguing that the Commission extended its statutory authority by including "attempts" as predicate offenses for career offender status the Tenth Circuit Court of Appeals concluded that the Commission acted within its broad grant of authority in construing attempts to commit drug crimes as controlled substance offenses for the purposes of determining career offender status. *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011). Similarly, in *U.S. v. Lightbourn,* a case involving a defendant that objected to a District Court ruling asserting that his prior drug conspiracy offenses triggered the Career Offender Status, the Fifth Circuit Court of Appeals determined that conspiracy offenses qualified as predicate offenses under § 4B1.1. for the purposes of determining Career Offender Status. The *Lightbourn* court noted, "The Sentencing Commission [after the 1995 amendment] lawfully included drug conspiracies in the category of crimes triggering classification as a career offender under § 4B1.1. of the Sentencing Guidelines." *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997).

There is no dispute regarding the fact that respondents were previously found guilty of felony conspiracy and attempt offenses. In the instant matter, the court is tasked with determining if the respondents' previous offenses classify as "Controlled Substance Offenses." Relying on precedent established in *Rodriguez-Rivera, Chaves,* and *Lightbourn* we assert that the previous convictions are classified as "Controlled Substance Offenses" as defined in USSG § 4B1.1. Additionally, we assert that attempt is also one of the offenses that the Sentencing Commission had in mind when promulgating Application Note 1. *United States v. Rodriguez-Rivera*. Furthermore, the *Chavez* court's determination that attempt offenses qualify as predicate offenses for the purposes of determining career offender status provides proof that a growing number of Circuit Courts have interpreted the guidelines in alignment with District Court Judge Banks' interpretation. *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); *United States v. Lewis*, 963 F.3d 16, (1st Cir. 2020); *United States v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997).

Therefore, the court should view the petitioner's conspiracy and attempt charges as predicate offenses under U.S.S.G. § 4B1.1 and uphold the career offender status determination made by the District Court Judge.

B. Commentary is an essential tool for providing "definitional provisions" for judges.

In *United States v. Martinez,* a case in which the defendant objected to a pre-sentencing report classifying his prior attempt offenses as crimes of violence, the Tenth Circuit Court of Appeals noted that Application Note 1 of § 4B1.2 is consistent with the language of the guidelines. The court determined that the application note should be used as a definitional provision. This indicates that when the guideline uses a word for a specific offense, the word is referring not only to the completed offense but also to conspiring or attempting to commit the offense. *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010).

Aside from the fact that § 4B1.2 is entitled "Definition of Terms Used in Section 4B1.1" which indicates that it is a definitional provision outright, courts have provided additional rationale for viewing Application Note 1 in the same light. In *Martinez,* the court reasoned that rather than cluttering the guidelines with every intended interpretation, the Commission uses the shorthand expression and leverages the application notes to provide the specific definitions. *United States v. Martinez,* 602 F.3d 1166, 1174 (10th Cir. 2010). Furthermore, the *Martinez* court affirmed that "definitions of terms used in the guidelines are commonly placed in the application notes. s*ee,* e.g., *id.* § 2A4.1 cmt. nn. 1–3 (defining terms used in the kidnapping guideline); *id.* § 2B1.1, cmt. n. 1 (defining terms used in theft guideline); *id.* § 3A.1.1 cmt. n. 2 (defining *vulnerable victim* in the hate-crime guideline)." *Id 1174.*

Respondents' assertion that the District Court's reliance on the application note was in error is patently false. As expressed in *Martinez* courts have interpreted application notes to provide definitional provisions to be employed by judges when making sentencing determinations. The omission of the words "conspiracy" and "attempt" in the guideline was an intentional decision made by the Sentencing Commission in an effort to establish concise, digestible guidelines. *Martinez.* If the commission were to include in the guidelines every possible meaning and interpretation they expected to be extrapolated, the guidelines would be exhaustive

and impractical. In lieu of over-explaining specifics in the guidelines, the Commission established Commentary and Application Notes to provide Judges with clarification regarding definitional provisions when determining sentencing. Furthermore, the usage of application notes to nest definitions is a standard practice of the Sentencing Commission. *Martinez.* If the Sentencing Commission did not intend for application notes to be used as definitional provisions, they would not systematically use them for such purposes.

Therefore, USSG § 4B1.1 intentionally omits usage of the words "attempt" and "conspiracy" because they are included in § 4B1.2 "Definition of Terms Used in Section 4B1.1." The omission of "attempt" and "conspiracy" from the guideline makes reliance on the application note for definitional provision a customary practice.

C. It is imperative that judges follow the Sentencing Guidelines to ensure that individuals receive equal punishment for equal crimes.

Section 994(h) of Title 28 of the United States Code requires the Sentencing Commission to set a term of imprisonment at near the maximum term authorized for an adult defendant who is convicted of a felony offense outlined in § 401 of the Controlled Substances Act (21 U.S.C § 841) and has previously been convicted of two or more prior felonies, each of which is an offense described in § 401 of the Controlled Substance Act. 28 U.S.C.A. § 994 (West). In *United States v. Allen* the court asserted that although at the time the background commentary to § 4B.1.1 Identified § 994 (h) as the source of the mandate implemented by the guideline, it was clear that the Commission could rely on the broader language of all other parts of § 994 (a), which in turn refers § 994, to include conspiracy related offenses in the career offender guideline. *United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994).

In the instant matter, the respondent's prior felony convictions meet the qualifications for being considered controlled substance offenses. In *Allen* the Tenth Circuit Court of Appeals reasoned that § 994 intended that conspiracy related offenses be included in the career offender guideline. Thus, even if opposing counsel is able to convince the court that Application Note 1 of the commentary to § 4B1.2 does not have bearing on whether attempt and conspiracy offenses qualify as predicate offenses under § 4B1.1 the court should refer to the analysis provided in *Allen.* When the District Court judge issued sentencing for the respondents, he did so

in accordance with 28 U.S.C § 994 (h). He issued sentences of imprisonment near the maximum term for the respondents because they fit the criteria outlined in the statute and are Career Offenders.

Therefore, this court should uphold the sentence issued by the District Court Judge because it is in alignment with the sentencing guidelines.

CONCLUSION

Sentencing Commentary serves an essential function within the criminal justice system, ensuring that defendants are provided with appropriate sentencing and upholding the virtues of fairness and justice. In the instant matter, District Court Judge Philip Banks leveraged sentencing commentary in an appropriate manner when determining that the respondent's previous felony convictions were classified as predicate offenses under § 4B1.1 for the purposes of Career Offender Status.

Applicant Details

First Name	**Evelyn**
Last Name	**McCorkle**
Citizenship Status	**U. S. Citizen**
Email Address	**epm2139@columbia.edu**
Address	**Address** **Street** **521 W. 111th Street, Apt 25A** **City** **New York** **State/Territory** **New York** **Zip** **10025**
Contact Phone Number	**7743924100**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L General - Copyright**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garnett, Margaret
margaretgarnett1@gmail.com
Briffault, Richard
richard.briffault@law.columbia.edu
212-854-2638
Metzger, Gillian
gmetzg1@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EVELYN MCCORKLE
521 West 111th Street, Apt 25A, New York, NY 10025 • (774) 392-4100 • epm2139@columbia.edu

June 12, 2023
The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student, Harlan Fiske Stone Scholar, and Executive Board member of the *Journal of Law and Social Problems* at Columbia Law School. I write to apply for a clerkship in your chambers for the 2024 term or any term thereafter. I am particularly interested in clerking in your chambers because of your dedication to public service and the invaluable experience you bring to the bench as a longtime litigator. As I look towards pursuing a career in federal prosecution, I would be thrilled to work with you and learn from you in any way I can.

I would bring my strong research and writing skills to your chambers. Last summer, I interned with the U.S. Attorney's Office for the Eastern District of New York. As an intern, I worked to finetune my legal research and writing skills and drafted both legal memoranda and motions in limine for use in ongoing cases. Attending proceedings before the E.D.N.Y. judges was the push I needed to consider pursuing a clerkship. My time at E.D.N.Y. also affirmed my goal of being a federal prosecutor. In the face of hefty caseloads and difficult legal problems, the AUSAs found creative solutions and represented the United States with skill and candor. I want to clerk for a judge with your experience, from whom I can learn how to be an effective advocate and responsible, public interest-minded prosecutor.

I also have experience working in federal district courts. This spring, I served as an intern for Judge Katherine Polk Failla at the U.S. District Court for the Southern District of New York. Working closely with the Judge and her clerks confirmed my own desire to clerk after graduation. I attended both civil and criminal proceedings, familiarized myself with courtroom practice, and honed my research and writing skills. As I develop my own skill set and style as a litigator, I want the experience that comes from working for a judge in a district with a demanding and fast-paced docket.

Enclosed please find my resume, transcript, and writing sample, which more fully detail my skills and experience. Following separately are letters of recommendation from Columbia Law School Professors Gillian Metzger (gem3@columbia.edu, 646-530-0640) and Richard Briffault (rbl4@columbia.edu, 212-854-2638), as well as Deputy U.S. Attorney for the Southern District of New York Margaret Garnett (margaretgarnett1@gmail.com). Thank you for your consideration, and please do not hesitate to contact me if you need further information.

Sincerely,

Evelyn McCorkle

EVELYN MCCORKLE

521 West 111th Street, Apt 25A, New York, NY 10025 • (774) 392-4100 • epm2139@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: *Journal of Law and Social Problems*, Executive Finance Editor (duties include engaging in all final reads with EIC and EE, running *JLSP* special projects, and reporting annual financials to the Board)
OutLaws, Judiciary Chair
Columbia Law Women's Association, Treasurer

Barnard College, Columbia University, New York, NY
B.A. received in Political Science May 2018
Minor: Economics
Honors: Dean's List (5/8 semesters)
Activities: Student Government Associate, VP of Finance
Research Assistant to Barnard College President Debora Spar
Bard Globalization and International Affairs Program

EXPERIENCE

Department of Justice Public Integrity Section, Washington, D.C.
Incoming Summer Intern Starting July 2023

Allen & Overy, New York, NY
Summer Associate May 2023 – July 2023
Researching and writing for: a CJA RICO conspiracy defense, a pro bono asylum matter, and a white collar/securities regulation cryptocurrency defense.

Office of the Hon. Judge Katherine Polk Failla, New York, NY
Spring Extern January 2023 – April 2023
Performed legal research and writing (produced a written opinion as to a motion to compel arbitration, an oral decision as to a motion to remand or in the alternative vacate without prejudice, and a memorandum on personal jurisdiction). Participated in proceedings (criminal and civil) taking notes for clerks.

United States Attorney's Office for the Eastern District of New York, Brooklyn, NY
Summer Legal Intern May 2022 – August 2022
Conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. Drafted motions in limine for use in ongoing cases. Participated in internal meetings, proffers, witness preparation sessions, status conferences, and trials.

NYC Department of Investigation, New York, NY
Confidential Investigator June 2018 – September 2021
Investigated cases of corruption, fraud, and other illegal activities committed by elected officials and other city employees, agencies, and nonprofit organizations receiving city funding. Produced policy recommendations and public reports on findings or referred cases for prosecution. Wrote three annual Anticorruption Reports for DOI Squad 5, covering corruption vulnerabilities and mitigation efforts undertaken by the agencies under Squad 5 oversight. Conducted surveillance, forensic accounting, wires, interviews, and arrests.

New Sanctuary Coalition, New York, NY
Pro Se Clinic Volunteer October 2019 – June 2021
Aided asylum seekers by completing I-589s, drafting affidavits, and working with assigned attorneys.

SKILLS AND INTERESTS

French (proficient) • NY State Rape Crisis Counselor • Car Camping • Crossfit • Dungeons & Dragons

Columbia Law School

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Evelyn P McCorkle

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L9137-1	S. Sentencing	Richman, Daniel; Sullivan, Richard	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

January 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8899-1	S. Practicing International Law: Maritime Conflicts and Law of the Sea	Harris, Robert; Waxman, Matthew C.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	B+
L6425-1	Federal Courts	Metzger, Gillian	4.0	B
L6269-1	International Law	Damrosch, Lori Fisler	3.0	A
L6675-1	Major Writing Credit	Metzger, Gillian	0.0	CR
L8812-1	S. Public Integrity and Public Corruption [Minor Writing Credit - Earned]	Briffault, Richard	2.0	A
L6683-1	Supervised Research Paper	Metzger, Gillian	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-12	Legal Practice Workshop II	McCamphill, Amy L.	1.0	P
L6169-1	Legislation and Regulation	Metzger, Gillian	4.0	A
L6116-4	Property	Merrill, Thomas W.	4.0	B
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: International Problem Solving	Hakimi, Monica	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B
L6133-2	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B+
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-12	Legal Practice Workshop I	McCamphill, Amy L.; Yoon, Nam Jin	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 59.0

Total Earned JD Program Points: 59.0

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to provide you with this letter of recommendation for Evelyn McCorkle, who I understand has applied for a clerkship with your chambers. I first came to know Evelyn when I was the Commissioner of the New York City Department of Investigation, where she worked as an Investigator prior to law school. DOI is the inspector general for all of New York City government, and Evelyn was assigned to Squad 5, which covers the non-profit contracting sector as well as all City elected officials, including the Mayor and City Hall. As a consequence, Evelyn worked on many highly sensitive and complex matters, always distinguishing herself with her work ethic, attention to detail, and determination to follow the facts wherever they led.

I worked directly and closely with Evelyn when she was one of the investigators assigned to a series of allegations related to the possible misuse of his NYPD security detail by the Mayor and his family. Because of the high-profile and sensitive nature of the investigation, I was personally involved in both the investigation and the writing and editing of the report that we ultimately issued in the fall of 2021. Thus, I had much more exposure to Evelyn and to her work than would typically be the case for a Commissioner and an entry-level investigator in the agency. Although Evelyn was barely a year out of college when the investigation began, she quickly became a key member of the team, with great investigative instincts, maturity beyond her years in handling difficult and contentious interviews, and tremendous dedication to advancing the investigation despite the challenges presented by the COVID-19 pandemic. I personally attended the investigative interviews of the Mayor and First Lady, given the sensitivities involved, and I watched with pride as Evelyn, together with her investigative partner, led these interviews with confidence, poise, professionalism, and outstanding judgment. Although Evelyn was about to leave DOI to begin law school at Columbia, she also contributed significantly to the drafting and editing of the public report outlining our findings. Such was Evelyn's dedication to this project and to her colleagues on the investigative team, that even after starting law school she continued to work on an hourly basis in order to ensure that she could contribute to the final report, issued in early October 2021.

In November 2021, I left DOI to return to the United States Attorney's Office for the Southern District of New York, to become the Deputy U.S. Attorney. I had previously served as an AUSA in that Office from 2005 to 2017, including as the Chief of the Violent & Organized Crime Unit, and the Chief of Appeals. I have stayed in close contact with Evelyn, as a mentor, since she left DOI for law school, and have seen her continue to grow professionally and seek out every opportunity to achieve her goals as a lawyer.

I am confident that Evelyn would be an asset to any District Court chambers — she is bright, hardworking, organized, and able to juggle multiple competing priorities effectively. She is insightful about people and their motivations and has great professional judgment. On an interpersonal level, she is a delight — funny, kind, optimistic, a selfless teammate — particularly important in the small and close-knit environment of chambers. Despite the significant gap in our positions at DOI, Evelyn had a wonderful manner with me — deftly navigating being appropriately deferential while also participating fully and thoughtfully in the robust debate that I insisted on from the team in such a sensitive and important investigation. I think many of these dynamics mirror what I imagine you might seek from your law clerks, and I firmly believe Evelyn will be up to the task. Finally, I know that Evelyn has a tremendous heart for public service, and that she is looking to her clerkship as the next step to prepare her for such a career. I know that she will bring the same integrity, commitment, and public-minded spirit to her work as a law clerk that she did to her work at DOI and to her internships in the EDNY U.S. Attorney's Office, at the Public Integrity Section of DOJ, and with Judge Failla.

Although I can't speak directly to Evelyn's legal analysis and legal writing (and I understand Dean Metzger's letter will address those), in all other respects I give Evelyn my strongest recommendation. Please don't hesitate to contact me if I can answer any questions or be of further assistance to you in the law clerk selection process. You can reach me by email at Margaret.garnett@usdoj.gov, or by phone at 212-637-1591 or 646-483-4406.

Margaret Garnett - margaretgarnett1@gmail.com

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Evelyn P. McCorkle

Dear Judge Walker:

I am writing in support of Evelyn P. McCorkle of the Columbia Law School Class of 2023, who is applying to you for a clerkship. Evelyn has excellent research and writing skills, an enthusiasm for learning and the law, and a demonstrated commitment to public service. She will make an excellent law clerk.

I taught Evelyn in two courses – Legal Methods in the Fall 2021 term and the Seminar on Public Integrity and Public Corruption in the Fall 2022 term. Legal Methods is Columbia's intensive "introduction-to-law" course, given at the start of the 1L year, to initiate students into the case method, statutory interpretation, and legal reasoning. Evelyn got off to a strong start in Le-gal Methods, demonstrating understanding of the material and eager engagement with legal analysis. As the course is taught on a pass-fail basis, I did not have occasion to closely evaluate her work.

Evelyn was an outstanding participant in my Seminar, which combines material on the white-collar crime aspects of corruption, with campaign finance law, lobbying regulation and government ethics. She was a frequent and insightful participant in class discussions, often taking the lead in analyzing the cases and statutes and linking them to current problems. She wrote four excellent reaction papers that displayed a close reading of the assignment and thoughtful assessment of the reasoning or arguments in the material. Over the course of the semester, she was in-creasingly attentive to the complexities of the subject – the risks of overcriminalization, the potential benefits of what is often pejoratively referred to as the "revolving door," and the difficulties of effectively regulating campaign finance and lobbying. Evelyn wrote an outstanding re-search paper on municipal offices of inspectors general, in which she compared the offices in New York City and Atlanta with respect to the motives for their creation, the type of oversight in which the office engages, the nature of its powers, its investigative authority, and its insulation from political control. The paper was thoroughly researched and very well written. Together the strength of the paper and quality of Evelyn's classroom work and reaction papers made it easy to give her an A for the Seminar.

Evelyn has a strong background in, and commitment to, public integrity work. Before coming to law school, she worked for three years as a confidential investigator at the New York City Department of Investigations. During her 1L year, she came to see me to discuss both law school and career opportunities in public integrity work. In addition to her Seminar classroom work, we have had extensive office discussions of the importance and challenges of that work.

Evelyn has excellent research and writing skills and legal experience, and she is deeply committed to public service. In her 1L summer, she worked as an intern in the United States Attorney's Office for the Eastern District of New York, where she conducted legal research and drafted memoranda regarding findings for cases from the Public Integrity and General Crimes sections. This past spring she was an extern in the Office of the Hon. Katherine Polk Failla, and this summer she will be an intern in the Public Integrity Section of the Department of Justice in Washington, D.C.

Beyond her specific experiences, strengths, and commitments, Evelyn brings an almost joyful curiosity to her work. She delights in learning and discussing law. She has an unusual zest to doctrinal analysis and legal research. I am sure you will find her a pleasure to have in your chambers.

Based on her strong research and writing skills, her demonstrated commitment to public service, and her enthusiasm for legal work, I am happy to recommend Evelyn P. McCorkle to you for a clerkship.

All the best,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

Richard Briffault - richard.briffault@law.columbia.edu - 212-854-2638

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I'm writing to recommend Evelyn McCorkle, a rising Columbia Law School 3L, for a clerkship in your chambers. Evelyn is an extremely smart and thoughtful law student with a deep commitment to public service. Teaching her has been a pleasure, and I'm sure she would be a wonderful and valued addition to chambers.

I have taught Evelyn in two classes at Columbia: Legislation and Regulation and Federal Courts. Evelyn got an A- in LegReg and was a very strong and important contributor to the class. Her comments were always nuanced and original, drawing insights from the three years she spent working in a local administrative office before law school. She is also very adept at doctrinal analysis. I would keep an eye out to make sure to call on her whenever she volunteered because I found her comments so valuable—and cold-calling her repeatedly seemed unfair!

I also enjoyed having Evelyn in Federal Courts. It was a much larger class with fewer volunteer opportunities, and I know for personal reasons it was a challenging time for her. Even so, Evelyn made great contributions when I called on her, and her comments in class and in office hours demonstrated a strong grasp of the material. I do not believe that the B grade she got in the class is an accurate reflection of her ability or understanding of Federal Courts. Indeed, what strikes me when I look at Evelyn's transcript is the strong trajectory upward. Like many students who took a few years off, it took her a little while to adjust to law school, but her grades 2L year are more in keeping with her impressive abilities.

I also supervised Evelyn's note, which is a well-written, comprehensive, and carefully argued assessment of judicial recusal reform. I was particularly impressed by Evelyn's initiative and ability to work independently. She had identified the topic and undertaken substantial research before we had our first substantive meeting—a very rare occurrence in my experience! Evelyn was never defensive but instead responded to criticism by rethinking her analysis and deepening her arguments in the process.

Finally, Evelyn is notably mature and has a warm and engaging manner. I really enjoyed our conversations about her note; Evelyn's excitement about her topic was always evident and contagious. She has a deep commitment to working on public corruption issues, and her enthusiasm for public service is a joy to see. I am confident you would enjoy working closely with her.

Please do not hesitate to contact me if there is any further information on Evelyn that I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

EVELYN MCCORKLE
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WRITING SAMPLE

This writing sample is a bench memorandum that I prepared while interning for Judge Katherine Polk Failla of the Southern District of New York. I received permission from the Judge to redact and rework the memo so that it could be used as a writing sample. For brevity I removed all but the discussion section, and for privacy I redacted all identifying information from the body of the memo itself. This has been edited only by me.

Summary of the Facts:

Plaintiff is an American board game company that entered into an agreement with Defendant Y, a British board game company. The agreement in question, termed the "License Agreement," included a forum selection clause, and limited how and when the License Agreement could be terminated. A number of years after the initial License Agreement was signed, another British board game company—Defendant Z—bought Defendant Y. Ultimately, Defendant Z then instructed Plaintiff that it was terminating the License Agreement. As a result, Plaintiff brought this suit against both Defendant Y and Defendant Z in the Southern District of New York, pursuant to the forum selection clause in the License Agreement. Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim.

DISCUSSION

Defendant Z moves the Court to dismiss for lack of personal jurisdiction, and for failure to state a claim. The Court should address the issues in the following order: (i) personal jurisdiction over Defendant Z, and (ii) failure to state a claim. Personal jurisdiction is a threshold issue—the case must be dismissed if the plaintiff fails to meet its burden of demonstrating that jurisdiction exists. As discussed below, the Court should deny both of Defendant's motions, finding that Plaintiff has sufficiently alleged jurisdiction under the successor-in-interest and "closely related" doctrines, and that Plaintiff has adequately alleged facts to state its claims.

A. Personal Jurisdiction

Defendant Z moves the Court pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure to dismiss it for lack of personal jurisdiction. Defendant Z further alleges that regardless, personal jurisdiction should be foreclosed by the due process guarantees of the Constitution, because—it alleges—it has not had the "minimum contacts" with New York necessary to be subject to jurisdiction here. *Id.* at 2.

The parties do not dispute that by its terms Defendant Z is not a signatory to the License Agreement between Plaintiff and Defendant Y. Rather, Plaintiff argues that personal jurisdiction nevertheless exists pursuant to either a theory of successor assumption of liability, or the "closely related" doctrine. (Pl. Opp. at 6-7). Defendant Z contends that its "parent-subsidiary" relationship with Defendant Y is insufficient to enforce the License Agreement's forum selection clause against it under the "closely related" doctrine. (Def. Br. at 1-2).

The Court should recognize that the law in this area is actively developing, but find that Plaintiff has alleged sufficient facts to support that Defendant Z has more than just a "parent-subsidiary" relationship with Defendant Y under either doctrine. Defendant Z has assumed Defendant Y's liabilities under New York law such that it can be bound by the License Agreement's forum selection clause and is subject to personal jurisdiction in New York. As such the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

"On a Rule 12(b)(2) motion, plaintiff carries the burden of demonstrating that jurisdiction exists, and where the district court did not conduct a full-blown evidentiary hearing on a motion, the plaintiff need make only a *prima facie* showing of jurisdiction." *Penachio* v. *Benedict*, 461 F. App'x 4, 5 (2d Cir. 2012) (summary order) (internal quotation marks and citations omitted). In deciding a Rule 12(b)(2) motion, the Court "construe[s] the pleadings and affidavits in the light most favorable to [the plaintiff], resolving all doubts in [its] favor." *DiStefano* v. *Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). However, the Court cannot "draw argumentative inferences in the plaintiff's favor" and need not "accept as true a legal conclusion couched as a factual allegation." *O'Neill* v. *Asat Trust Reg.*, 714 F.3d 659, 673 (2d Cir. 2013).

If the Court lacks personal jurisdiction over a defendant, the claims against that defendant must be dismissed. However, in deciding a pretrial motion to dismiss for lack of personal jurisdiction "a district court has considerable procedural leeway." *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (citations omitted). The Court may "determine the motion on the basis of

affidavits alone or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Id.* Still, the "[p]laintiff ultimately bears the burden of establishing personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial." *Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+ Distribution S.A.S.*, No. 07 Civ. 2918 (DAB), 2010 WL 537583, at *5 (S.D.N.Y. Feb. 9, 2010).

"As a general rule," New York contract law does not hold an entity "purchasing the assets of another … liable for the debts and liabilities of the seller." *Miller* v. *Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 525 (S.D.N.Y. 2018), *aff'd* 774 Fed. App'x 714 (2d Cir. 2019). However, the general rule does not apply in four scenarios: where "[i] a buyer who formally assumes a seller's debts; [ii] transactions undertaken to defraud creditors; [iii] a buyer who de facto merged with a seller; and [iv] a buyer that is a mere continuation of a seller." *Aguas Lenders Recovery Grp.* v. *Suez, S.A.*, 585 F.3d 696, 702 (2d Cir. 2009). Each scenario communicates a sufficiently close relationship between buyer and seller to bind the buyer to the seller's obligations. The third scenario, "buyer who de facto merges with a seller," can be satisfied by a successor-in-interest analysis. "Thus, for example, 'when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule.'" *Aguas Lenders Recovery Grp.*, (2d Cir. 2009) (ellipses in original) (quoting *Nettis* v. *Levitt*, 241 F.3d 186, 193 (2d Cir. 2001), overruled on other grounds by *Slayton* v. *Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006)). The Second Circuit has further held that successors to contracts under the de facto merger doctrine should be prevented "from using evasive, formalistic means lacking economic substance to escape contractual obligations." *Nitro Elec. Co., Inc.* v. *ALTIVIA Petrochemicals, LLC*, No. 3:17 Civ. 2412 (RCC), 2017 WL 6567813, at *4 (S.D.W. Va. Dec. 22, 2017). There appears to be a degree of overlap between the successor-in-interest/de facto merger doctrine and the "closely related" doctrine that also stems from *Aguas*, in that courts have found that successors-in-interest can in some circumstances satisfy the "closely related" test. *See Vuzix Corp.* v. *Pearson*, No. 19 Civ. 689 (NRB) 2019 WL 5865342, at *5 (S.D.N.Y. November 6, 2019) quoting *Affiliated FM Ins. Co.* v. *Kuehne + Nagel, Inc.*, 328 F. Supp. 3d 329, 336 (S.D.N.Y. 2018); *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

As evidenced by the availability of both the successor-in-interest doctrine discussed above, and the "closely related" doctrine to follow, the Second Circuit has "declined to adopt a standard governing precisely 'when a signatory may enforce a forum selection clause against a non-signatory.'" *Fasano* v. *Li*, 47 F.4th 91, 103 (2d Cir. 2022) (quoting *Magi XXI, Inc.* v. *Stato della Città del Vaticano*, 714 F.3d 714, 723 N.10 (2d Cir. 2013)). Under the "closely related" doctrine, non-signatories may be bound by forum selection clauses where, "under the circumstances, the non-signatories enjoyed a sufficiently close nexus to the dispute or to another signatory such that it was foreseeable that they would be bound." *Fasano*, 714 F.3d at 103. Under this doctrine, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is "closely related" to one of the signatories. *Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5 (internal quotation marks and citations omitted). Non-signatories have been found "closely related" where their interests are "completely derivative of" and "directly related to, if not predicated upon" the signatories' interests or conduct. *Id.* Courts typically find parties to be "closely related" in two situations: "where the non-signatory had an active role in the transaction between the signatories or where the non-signatory had an active role in the company that was the signatory." *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336 (internal quotation marks omitted). But, as discussed above, courts in this district have also found that "successors-in-interest . . . at least in some instances, satisf[y] the 'closely related' test." *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

In recent years, a number of courts in the Southern District of New York have argued that while the *Aguas* doctrines are appropriate as to motions to dismiss based on grounds of improper venue and forum non conveniens, motions to dismiss for lack of personal jurisdiction are different. *See e.g., Arcadia Biosciences, Inc.* v. *Vilmorin & Cie*, 356 F. Supp. 3d. 379, 389 (S.D.N.Y. 2019). These courts assert that "the rules governing personal jurisdiction" are "driven by constitutional concerns over the court's power to exercise control over the parties." *Id.* at 389 (internal quotation marks and citations omitted). Under this argument, plaintiffs must make some showing that defendants have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Courts in these circumstances may not exercise personal jurisdiction unless "the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2L.Ed.2d 1283 (1958).

Some courts have found that these constitutional requirements "caution against a liberal application of forum selection clauses to non-signatory defendants." *Arcadia Biosciences, Inc.* 356 F. Supp. 3d at 389; *see also Mersen USA EP Corp.* v. *TDK Electronics Inc.*, 594 F. Supp. 3d 570 (S.D.N.Y. 2022). However, other courts—inside and outside this district—have found that the "closely related" doctrine can justify the exercise of personal jurisdiction over non-signatory defendants regardless of whether they had previous minimal contacts with the forum state. *See, e.g., Metro-Goldwyn-Mayer Studios Inc.*, 2010 WL 537583, at * 5; *Franklink Inc.* v. *BACE Servs., Inc.*, 50 F.4th 432, 437, 441-43 (5th Cir. 2022).

2. The Court Has Personal Jurisdiction Over Defendant Z.

Personal jurisdiction is a threshold issue; as such, the Court begins by determining whether Defendant Z has consented to personal jurisdiction, and whether the exercise of personal jurisdiction over Defendant Z comports with the constitutional requirements of due process. *See Basile* v. *Walt Disney Co.*, 717 F. Supp. 2d 381, 385 (S.D.N.Y. 2010) ("[V]enue and personal jurisdiction are threshold procedural issues to be decided before the substantive grounds in a motion to dismiss.").

The License Agreement signed by Plaintiff and Defendant Y contains the following forum selection clause:

> (1) This Agreement shall be construed in accordance with the law of the state of New York, United States, without respect to its choice of law principles . . . Any legal action or proceeding arising under this Agreement will be brought exclusively in the federal or state courts located in New York City, United States, and each party irrevocably consents to personal jurisdiction and venue therein and waives any claim of improper venue or inconvenient forum. In the event of a dispute arising out of or relating to this Agreement, the prevailing party shall be entitled to receive from the other party its reasonable attorneys' fees and costs.

(Pl. Opp. Ex. B at § 16). Given the inclusion of this forum selection clause in the License Agreement between Plaintiff and Defendant Y, a determination of personal jurisdiction depends on whether Defendant Z, a non-signatory to the License Agreement, can nonetheless be bound by it. If

Defendant Z is bound by the License Agreement it has consented to personal jurisdiction in this Court.

To make this determination, the Court should turn to the two doctrines under *Aguas* discussed above. The first, successor-in-interest/de facto merger liability, occurs "when a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, [such that] the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and internal citations omitted). The second line of cases concerns the "closely related" doctrine, but because the "closely related" test can be satisfied by a successor-in-interest finding, the Court should proceed first with that analysis. *Vuzix Corp.*, 2019 WL 5865342, at *5 quoting *Affiliated FM Ins. Co.,* 328 F. Supp. 3d at 336.

a. Defendant Z is a Successor-in-Interest to Defendant Y

"[W]hen a successor firm acquires substantially all of the predecessor's assets and carries on substantially all of the predecessor's operations, the successor may be held to have assumed its predecessor's . . . liabilities, notwithstanding the traditional rule [that an entity purchasing the assets of another is not liable for the debts and liabilities of the seller]." *Aguas Lenders Recovery Grp.*, 585 F.3d at 702 (2d Cir. 2009) (ellipses in original and omitting internal citations). Here, though the exact nature of the Defendant Z purchase of Defendant Y is unclear (Pl. Opp. at 4), Defendant Z acknowledges a parent-subsidiary relationship between the defendants (Def. Br. at 1). Though Defendant Y remains in existence at least on paper, Plaintiff alleges that after Defendant Z made its purchase of Defendant Y, it took over all communications with Plaintiff, and ultimately Defendant Z—not Defendant Y—notified Plaintiff that it was terminating the License Agreement. (Compl. § 42; Pl. Opp. at 2). Plaintiff further alleges that Defendant Y "effectively has zero ongoing operations," and that Defendant Z personnel conduct the marketing for Defendant Y products, and handle "all account, customer/sales and support inquiries about [Defendant Y] products" directed to Defendant Z email addresses, such that customers contacting Defendant Y getting replies from support@"Z"hqhelp.zendesk.com. (Pl. Opp. at 6-7).

Moreover, there appears to be no dispute between Plaintiff and Defendant Z that Defendant Z acquired substantially all of Defendant Y's assets. The "Notice of Termination of Brand/Product License Agreement," which was sent to Plaintiff on January 21, 2022, states in relevant part "As you know, all of the asserts and outstanding ownership shares of [Defendant Y] were sold to [Defendant Z] pursuant to that certain Share Purchase Agreement by and among Mr. Z and Mrs. Z, [Defendant Z], dated as of September 23, 2021." *Id.* While it is true, as Defendant Z argues, that "a forum selection clause may not be enforced against a non-signatory parent corporation solely by virtue of its status as a parent corporation," *Array Biopharma, Inc.* v. *AstraZeneca PLC*, No. 18-cv-235 (PKC) 2018 WL 3769971, at *1 (S.D.N.Y. Aug. 9, 2018), the Notice of Termination email merely serves to confirm Plaintiff's allegations to the effect that Defendant Z acquired substantially all of Defendant Y's assets, while the rest of Plaintiff's alleged facts support their assertion that there exists more than a parent-subsidiary relationship between the Defendants in this case. Plaintiff has compellingly alleged that Defendant Z has also taken over substantially all of Defendant Y's operations. (Pl. Opp. at 9) ("Defendant Y has no employees, no officers, no directors, and no independent financial resources other than those held by Defendant. If Defendant Z is not *de jure* Defendant Y at this point, it is certainly *de facto* Defendant Y.").

Moreover, Plaintiff convincingly argues that Defendant Z was aware of the existence of the forum selection clause and that it might be defensively invoked. (Compl. §§ 35; 37-39). While the precise corporate relationship between Defendant Z and Defendant Y is unclear at this stage of litigation, the facts alleged by Plaintiff suffice for the Court to conclude that Defendant Z is Defendant Y's successor-in-interest under New York law. *See Metro-Goldwyn-Mayer Studios Inc.* v. *Canal+Distribution S.A.S.*, No. 07-civ-2918 (DAB), at *5 (S.D.N.Y. Feb. 9, 2010) (finding that a successor-in-interest owning a majority of signatory's shares, despite an unclear corporate relationship, is sufficient basis to conclude the plaintiff may invoke the contractual forum selection clause against the non-signatory entities that are "closely related" and deny defendants' motion to dismiss for lack of personal jurisdiction).

Plaintiff has adequately alleged that Defendant Z acquired substantially all of Defendant Y's assets and has taken on substantially all of its operations, thus fitting squarely in the role of successor under the *Aguas* line which permits exception to the general rule and provides an argument that Defendant Z is bound by the License Agreement and has consented to personal jurisdiction in New York. *Aguas*, 585 F.3d at 702. Resolving all doubts in Plaintiff's favor, *see DiStefano*, 286 F.3d at 84, the facts support that Defendant Z de facto merged with and is the successor to Defendant Y such that it may be held to the License Agreement's forum selection clause. *Aguas,* 585 F.3d at 702.

b. As Its Successor-in-Interest, Defendant Z is "Closely Related" to Defendant Y

Plaintiff would no doubt argue that the Court's analysis could end here, because it has sufficiently pleaded that Defendant Z is a successor-in-interest to Defendant Y. But Defendant Z argues that more is needed for a party to be found "'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound." (Def. Br. at 7) (quoting *Cuno, Inc.* v. *Hayward Indus. Prods., Inc.*, No. 03-civ-3076 (MBM), 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (internal citations omitted). Defendant Z asserts that Plaintiff has failed to allege foreseeability under a *Fasano* framework—which finds foreseeability where "[i] . . . the non-signatory acquiesce[s] to the forum selection clause 'by voluntarily bringing suit with signatories'; [ii . . .] non-signatories provide . . . letters of credit to signatories and 'ha[ve] interests in the litigation that were directly related to, if not predicated upon those of the signatories'; and [iii] where non-signatories were . . . integrally related to signatories 'such that suit should be kept in a single forum.'" (Def. Br. at 7) (quoting *Fasano* at 103-04) (internal citations omitted).

Defendant Z also attempts to differentiate *Fasano* by emphasizing that the Second Circuit's decision there turned on the fact that "'it was repeatedly stated' that the non-signatory defendants would undertake the conduct underlying the complaint subject to the terms of conditions of 'the contract that contains the Forum Selection Clause' rendering 'reasonably foreseeable'" they would be bound. (Def. Br. at 7-9). Defendant Z argues that Plaintiff has failed to allege similar facts, and is unable to show that Defendant Z could have foreseen being the subject to the forum selection clause.

It *is* reasonable to differentiate *Fasano* from the case at hand; the License Agreement between Defendant Y and Defendant Z has not been provided to the Court, and so it is not clear whether Defendant Z was forewarned that it would be subject to the License Agreement with Plaintiff in the very explicit way the Second Circuit held that the defendant was in *Fasano*. If the License Agreement between Defendant Z and Defendant Y was that explicit, the Court has had no opportunity to confirm as much. In fact, Plaintiff makes complaints to this effect, noting that Defendant Z has refused to

produce documents in response to Plaintiff's discovery requests. (Pl. Opp. 2; 5). This does not, however, mean that the Court cannot find Defendant Z sufficiently "closely related" to Defendant Y for it to have been foreseeable that it could be bound as a non-signatory to the License Agreement. It is true that many courts have found parties "closely related" under *Aguas* for the reasons Defendant Z discusses, such as where defendants have had an active role in the initial transaction, or had a close relationship to the signatory at the time of the agreement. This does not refute the fact that still other courts have found parties "closely related" as "non-signatory alter egos, corporate executive officers, and successors-in-interest." *Affiliated FM Ins. Co.*, 328 F. Supp. 3d at 336; *see also Miller v. Mercuria Energy Trading, Inc.* 291 F. Supp. .3d 509, 524-25 (S.D.N.Y. 2018) (collecting cases).

Under a theory of successor-in-interest, and thus permissively under the "closely related" doctrine, Plaintiff has adequately alleged that Defendant Z should be bound to the License Agreement at issue and to the forum selection clause therein. This finding brings the Court to the final argument Defendant Z asserts with respect to its 12(b)(2) motion: that applying precedent from the *Aguas* line, including the "closely related" doctrine, is inappropriate in the personal jurisdiction context as it raises due process concerns. (Def. Br. at 10); *see also Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395.

c. The "Closely Related" Doctrine Does Not Require Defendant Z to Have Minimal Contacts With New York State

This Court is cognizant that its use of the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction implicates the concerns of some courts regarding the constitutionality of imposing personal jurisdiction on a non-signatory with no minimal contacts in the forum state. *See Mersen USA,* 2022 WL 902372, at *10; *Arcadia* 356 F.Supp.3d at 395. The "closely related" doctrine has roots in *Aguas*, which, as the *Mersen USA* and *Arcadia* courts noted, was decided under the principle of forum non conveniens, not personal jurisdiction. *Fasano*, too, was decided under the "closely related" doctrine and in the context of forum non conveniens as opposed to personal jurisdiction. Select lower courts in other circuits have raised similar concerns that the doctrine is in tension with the Supreme Court's minimum contacts requirements. *Fitness Together Franchise, LLC* v. *EM Fitness, LLC,* No. 1:20-cv-02757-DDD-STV, 2020 WL 6119470, at *5 (D.Colo. Oct. 16, 2020).

However, as Defendant Z admits (Def. Br. at 8), in other cases, including a recent and well-reasoned decision in the Fifth Circuit, courts *have* found it appropriate to bind non-signatory defendants subject to contractual forum selection clauses under the "closely related" doctrine in the context of a motion to dismiss for lack of personal jurisdiction. *Franklink Inc.,* 50 F.4th at 441-43. The Fifth Circuit acknowledged in *Franklink Inc.* the percolating legal theory that due process concerns should deter application of the "closely related" doctrine in the personal jurisdiction context, and the fact that the "closely related" has admittedly "vague standards." *Id.* at 440. This Court should concur with the Fifth Circuit's findings that the Third and Seventh Circuits have provided more clarification and explanation of the theory than other circuits. *Id.* at 439. Ultimately, the Fifth Circuit found that the doctrine has been sufficiently scrutinized. *Id.* at 441. In explaining its decision not to apply a minimal contacts requirement, the Fifth Circuit noted that the "closely related" doctrine "has been recognized by all other circuits to have considered it" and as such it was loath to create a circuit split, particularly when the doctrine could "serve a purpose in producing equitable results." *Id.* While not bound by the Fifth Circuit, this Court should find its argument persuasive that "prudence and judicial modesty caution against singularly swimming against this tide of authority." *Id.* The Second Circuit

has not spoken on this issue specifically or particularly clearly—*Fasano* was decided in the context of forum non conveniens—and until the Second Circuit does speak, the *Aguas* line supports a tailored application of the "closely related" doctrine, even on a motion to dismiss for lack of personal jurisdiction.

B. Failure to State a Claim

Defendant Z also moves the Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's claims against it for failure to state a claim. Defendant Z argues that Plaintiff's claims should be dismissed because Defendant is a non-signatory to the License Agreement that "is the foundation of [Plaintiff]'s case" (Def. Br. at 13). For the reasons outlined below, the Court should deny Defendant Z's motion to dismiss.

1. Applicable Law

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (omitting internal citations). The Court should grant dismissal pursuant to Rule 12(b)(6) only where the complaint cannot state any set of facts that would entitle the plaintiff to relief." *Hertz Corp.* v. *City of N.Y.*, 1 F.3d 121, 125 (2d Cir. 1993). In determining the viability of Plaintiff's claims, the Court must accept as true all well-pleaded factual allegations in the complaint. *Id.* at 678. Additionally, the Court may consider not only the complaint itself, but also documents attached to the complaint as exhibits, any statements or documents incorporated by reference in the complaint, and documents that are "integral" to the complaint even if they are not incorporated by reference. *See Chambers* v. *Time Warner, Inc.,* 282 F.3d 147, 152-53 (2d Cir. 2002); *see generally Goel* v. *Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (discussing materials that may properly be considered in resolving a motion brought under Fed. R. Civ. P. 12(b)(6), explaining that "[a] document is integral to the complaint 'where the complaint relies heavily upon its terms and effect,'" which often involves "a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls"). However, "although a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris* v. *Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks, alterations, and citations omitted); *see also Rolon* v. *Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (explaining that a court need not accept "conclusory allegations or legal conclusions masquerading as factual conclusions").

2. Failure to State a Claim Discussion

Defendant Z asserts that "even if [it] were subject to jurisdiction in New York, [Plaintiff]'s claims against it should be dismissed because it is not a party to the agreement that is the foundation of [Plaintiff]'s case." (Def. Br. at 13). Plaintiff argues that Defendant Z "has assumed the role of Defendant Y in connection with the Agreement" and that Defendant Z, not Defendant Y, worked with Plaintiff after Defendant Z's acquisition of Defendant Y in September 2022. (Pl. Opp. at 9). Moreover, Plaintiff claims that Defendant Z, not Defendant Y, "purported to terminate the Agreement" which, it alleges, is the "breaching" action that led to the damages Plaintiff asserts. *Id.*

For substantially the same reasons identified in its consideration of the License Agreement's forum-selection clause, the Court should find that Plaintiff adequately pleads facts sufficient to support that Defendant Z so completely acquired Defendant Y's assets and took over its operations as to become Defendant Y's successor, sufficiently "closely related" to be bound to the contract despite being a non-signatory. As discussed below, the Court should also find that Plaintiff has adequately plead breach of contract and anticipatory breach of contract.

a. The Complaint Adequately Pleads a Breach of Contract

Under New York law, a claim for breach of contract must allege: "[i] the existence of an agreement, [ii] adequate performance of the contract by the plaintiff, [iii] breach of contract by the defendant, and [iv] damages." *Harsco Corp.* v. *Segui*, 91 F.3d 337, 348 (2d Cir. 1996). "In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issues." *Wolff* v. *Rare Medium, Inc.*,171 F.Supp.2d 354, 358 (S.D.N.Y. 2001). Accepting as true all well-pleaded factual allegations in the complaint as the Court must, the Court should find that Plaintiff has plead sufficient facts to allege its own adequate performance of the License Agreement.

The existence of the License Agreement is clear and the fact that Defendant Z is bound to it has been settled above and thus satisfies the first element of breach.

Plaintiff sufficiently alleged both its own adequate performance—satisfying the second element—and damages that it suffered—satisfying the fourth element of breach. Plaintiff stated that in reliance on the assurances of first Defendant Y and later Defendant Z, it continued its efforts under the License Agreement between July 2021 (when Defendants first began negotiating their transaction) until the end of December 2021 (when Plaintiff was at last informed of Defendant Z's consideration of a plan to terminate the Agreement), and that this effort amounted to more than one million dollars in investments in inventory and related expenses, advertising, marketing, and development. (Compl. at §§ 36-40). Plaintiff further alleges that it has suffered damages in an amount significantly higher than one million dollars, estimating the damages to exceed $35 million. (Compl. at § 55).

A determination of the remaining element of breach depends on an accurate reading of the License Agreement at issue. If, as Plaintiff alleges, Defendant's termination of the License Agreement constitutes a breach, then all elements of breach of contract have been satisfied.

Plaintiff alleges that Defendant Z's termination of the License Agreement was not authorized for multiple reasons: its interpretation of the Change of Control provision (Pl. Opp. Ex. B at § 9(f)), its interpretation of the Force Majeure provision (Pl. Opp. Ex. B at § 14), and its understanding that Defendant Y waived any potential justification based on sales targets in its communications with Plaintiff in late 2020.

The License Agreement between Plaintiff and Defendant Y provides that the initial term of the Agreement was to end on December 31, 2027 after which the Agreement would automatically renew for terms of one year unless terminated in accordance with the Agreement. (Pl. Opp. Ex. B at § 9(a)). What Plaintiff describes as the Change of Control Provision states:

> A party may terminate this Agreement upon written notice to the other party if (i) insolvency, bankruptcy, or similar proceedings are instituted by or against such party, (ii) there is any assignment or attempted assignment by such party for the benefit of creditors, (iii) there is any appointment, or application of such appointment of a receiver for such party; or (iv) there is a sale or transfer of all or substantially all of the assets, or a merger or consolidation of such party, or a transfer of ownership that results in a change of voting control of such party.

(Pl. Opp. Ex. B at § 9(f)). Plaintiff invokes the most recent antecedent grammatical canon, and provides compelling examples as to why any alternative to reading the provision as protecting the non-changing party (as opposed to the party experiencing the change of control) would result in absurd outcomes. Plaintiff's reading of the provision is the best reading. Further, accepting as true Plaintiff's factual allegations as to its communications with Defendants and the shipping difficulties it experienced, the Agreement's Force Majeure provision supports Plaintiff's assertion that Defendant's attempted termination of the Agreement was unauthorized and constitutes breach. (Pl. Opp. Ex. B at §§ 14; 9).

In sum, Plaintiff sufficiently alleged (i) the existence of an agreement, (ii) its own adequate performance of the contract, (iii) breach of contract by Defendant Z, and (iv) resulting damages. Thus, the Court should find that Complaint adequately pleads a breach of contract.

b. The Complaint Adequately Pleads Anticipatory Breach of Contract

As to Plaintiff's claim of anticipatory breach, "[a]nticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty." *Lucente* v. *Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). Anticipatory repudiation "can be either a statement by the obligor to the oblige indicating that the obligor will commit a breach that would itself give the oblige a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Princes Point LLC* v. *Muss. Dev. L.L.C.,* 30 N.Y.3d 127, 133, 87 N.E.3d 121 (2017) (quoting *Norcon Power Partners* v. *Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.d2 664, 705 N.E.2d 656 (1998)). "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'" *Princes Point LLC*, 30 N.Y.3d at 133 (quoting *Tenavision, Inc.* v. *Neuman*, 45 N.Y.2d 145, 150 (1978)). When confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. It may either (i) "elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties," or (ii) "continue to treat the contract as valid and await the designated time for performance before bringing suit." *Lucente*, 310 F.3d at 258.

Plaintiff obviously has opted for the latter. (Compl. § 41) (stating that "[n]otwithstanding [Defendant's breach], [Plaintiff] continued performing its obligations under the Agreement . . . ."). As for a positive and unequivocal expression of intent not to perform by the repudiator, it is difficult to imagine a more unequivocal expression of intent not to perform than if Defendant, as alleged, informed Plaintiff of its intent to terminate i.e. cease compliance with the Agreement and follow through in announcing it has done so. (Compl. § 40; 42). As such, Plaintiff has adequately pleaded anticipatory repudiation of contract.

Applicant Details

First Name	**Katherine**
Last Name	**McMullen**
Citizenship Status	**U. S. Citizen**
Email Address	**kmm475@georgetown.edu**
Address	**Address** **Street** **455 I Street NW, Apt. 606** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20001** **Country** **United States**
Contact Phone Number	**5408787987**

Applicant Education

BA/BS From	**Stanford University**
Date of BA/BS	**June 2016**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**June 7, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**The Georgetown Journal of Legal Ethics**
Moot Court Experience	**Yes**
Moot Court Name(s)	**GULC Beaudry Moot Court Competition (2021) - Semifinalist** **Federal Bar Association Thurgood Marshall Moot Court Competition (2022) - top 8 teams**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kamerick, Eileen
eileen.kamerick@gmail.com
(847) 846-3200

Langevoort, Donald
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Keenan, Frances
keenan@abell.org
443-226-1237

Satterthwaite, Emily
eas395@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katherine McMullen
455 I Street NW, Apt. 606, Washington, D.C. 20001
(540) 878-7987 | kmm475@georgetown.edu

May 25, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

As an expected June 2023 graduate of Georgetown University Law Center, I would like to be considered for a 2024-2025 clerkship with your chambers in Norfolk, Virginia. Having gained exposure to litigation through my prior professional experiences and future experience as an incoming litigation associate at Kirkland & Ellis in Washington, D.C., I am very interested in clerking in the Eastern District of Virginia because of the opportunity to observe a fast-moving docket with vast exposure to government-facing litigation, including a wide-range of criminal prosecutions and national security matters. Additionally, I grew up in Fauquier County, VA, in Broad Run, and am excited about the opportunity to clerk in the district covering my home county. I am particularly interested in working for your chambers because of your strategic vantage point in the Fourth Circuit and your background in prosecution—the Court must apply its precedents, but I want to learn how those precedents are considered alongside a deep understanding of the inequities that exist within the justice system.

I chose to attend Georgetown to begin my legal career because I wanted to spend my time meeting practitioners and learning how the law is applied practically, outside the classroom. Through internships, including with Judge Kelly at the U.S. District Court for the District of Columbia and Judge Crowell at D.C. Superior Court, I gained exposure to how attorneys operate in the real world, and spent time drafting motions and memoranda, alongside various research assignments to assist both litigators and judicial clerks as they prepared for trial. It is through these experiences that I decided I wanted to clerk—the opportunity to see how the law is decided in action, and the messiness of wrestling with precedent to create the best legal outcome is one I would value extensively.

Prior to coming to law school I also saw litigation up-close—I worked for the Abell Foundation, a nonprofit that had a portfolio investment embroiled in IP litigation in the USITC and district courts. I assisted with research for complaint story-crafting, deposition preparation, and privilege log work, among other trial and settlement documents associated with the litigation. Alongside this work on IP litigation at Abell, I worked for the Chair of the Baltimore County Sexual Assault Reform Task Force. Through this role I interviewed public lab directors across Maryland regarding their practices surrounding sexual assault forensic evidence kits, interfaced with law enforcement, the Baltimore County State's Attorney's Office and other stakeholders, and drafted sections of the final report that was released by the County Executive.

Clerking offers a singular opportunity to further develop my foundational understanding of how the law works in practice, and I am excited to apply for this opportunity with your chambers in Norfolk. Enclosed please find my resume, list of references, law school transcript, and writing sample. Arriving separately through Oscar are letters of recommendation from Professors Donald Langevoort, Emily Satterthwaite, and Eileen Kamerick, along with a letter of recommendation from a prior supervisor of mine, Frances (Francie) Keenan of the Abell Foundation. I can be reached at kmm475@georgetown.edu or by phone at +1 (540) 878 7987. I look forward to hearing from you.

Best,

Katherine McMullen

KATHERINE MCMULLEN

455 I Street NW, Apt. 606, Washington, D.C. 20001 | (540) 878-7987 | kmm475@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — Expected June 2023
GPA: 3.62
Journal: *The Georgetown Journal of Legal Ethics*
Honors: Business Law Scholar, Cohort Four
Barristers' Council, Appellate Advocacy Division (Moot Court)
Exceptional Pro Bono Pledge Honoree
Activities: Peer Tutor for 1Ls (Civil Procedure) (Fall 2022)
Research Assistant, *The Georgetown Law Journal Annual Review of Criminal Procedure* (Summer 2021)
1L Representative, Corporate & Financial Law Organization (2020-2021)

STANFORD UNIVERSITY — **Stanford, CA**
Bachelor of Arts in International Relations — June 2016
Minor: Middle Eastern Languages, Literature & Cultures
Study Abroad Awards: Clinton Scholarship, American University in Dubai, United Arab Emirates (August-December 2014)
USDE Fulbright-Hays Fellowship Grant awarded by the University of Virginia for study at Yarmouk University in Irbid, Jordan (June-August 2014)
Activities: Stanford Women in Business, Board Member (2015-2016) & Other Roles (2012-2015)

EXPERIENCE

KIRKLAND & ELLIS — **Washington, D.C.**
Incoming Litigation Associate — Expected Fall 2023
Summer Associate — May 2022-July 2022
- Performed legal research, drafted memo on SEC rule, and reviewed documents for FCPA investigation

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA — **Washington, D.C.**
Judicial Extern, Chambers of the Honorable Timothy J. Kelly — January 2023-April 2023
- Performed legal research, drafted sections of opinions and drafted bench memo on contract issue

DEPARTMENT OF JUSTICE — **Washington, D.C.**
Volunteer Law Student Extern, Organized Crime and Gang Section — August 2022-November 2022
- Performed legal research and drafted motions on evidentiary and other issues

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA — **Washington, D.C.**
Judicial Extern, Chambers of the Honorable James A. Crowell IV — January 2022-April 2022
- Performed legal research, assisted with docket preparation, and drafted both sentencing and bench memos, including multiple memos for Incarceration Reduction Amendment Act (IRAA) cases

U.S. ATTORNEY'S OFFICE, DISTRICT OF COLUMBIA — **Washington, D.C.**
Volunteer Law Student Extern, Violent Crimes and Narcotics Section — September 2021-December 2021
- Performed legal research, redacted discovery documents, and drafted sections of motions

U.S. ATTORNEY'S OFFICE, DISTRICT OF MARYLAND — **Baltimore, MD**
Summer Law Student Intern — June 2021-July 2021
- Performed legal research, summarized witness testimony for use in appellate brief, and drafted sections of motions

ABELL FOUNDATION — **Baltimore, MD**
Analyst and Executive Assistant to the Senior Vice President — May 2017-October 2019; March 2020-August 2020
- Provided litigation support, including privilege log analysis, complaint story-crafting and Relativity discovery database research, for portfolio investment involved in intellectual property disputes in USITC and District Court
- Updated various competitor and market analyses for active direct investments, including those in the automotive powertrain, hydropower, and gasification technology spaces, and performed diligence for potential new investments
- Developed and implemented audit of over 200 sexual assault cases in Baltimore County; interviewed stakeholders and drafted sections of report on findings for release by County Executive

LORI SYSTEMS — **Nairobi, Kenya**
Executive Coordinator — November 2019-March 2020
- Developed pitch decks for use in high-level investor meetings and developed and implemented strategic partnership and internal operations strategies in collaboration with executive team

PLOUGHSHARES FUND — **Washington, D.C.**
Research Assistant — September 2016-March 2017
- Conducted in-depth nuclear weapons and security research to inform senior staff talking points and co-authored article on weapons transport regarding lack of security protocols during domestic transport of nuclear arms

COMMUNITY INVOLVEMENT & INTERESTS

- Georgetown University Pre-Law Society Mentor (2021-Present); Thread (thread.org) Head of Family (2017-2019)
- Nonfiction, culinary history, and fitness

Katherine McMullen List of References:

Frances (Francie) Keenan
Senior Vice President, Abell Foundation
Supervisor at Abell from 2017-2020.
keenan@abell.org
(410) 547-1300 (office main line)

Hans Miller
Trial Attorney, Organized Crime & Gang Section (OCGS), U.S. Department of Justice
Supervisor at OCGS, Fall 2022.
Hans.Miller@usdoj.gov
202-353-2099 (desk phone)

Professor Eileen Kamerick
Adjunct Professor of Law, Georgetown University Law Center
Professor for Corporate Boards Seminar, Spring 2023.
Eileen.kamerick@gmail.com (preferred)
Eak149@georgetown.edu (alternate)
(847) 846-3200 (cell phone)

Record of: Katherine M. McMullen
GUID: 819485445

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	22	Civil Procedure Aderson Francois	4.00	A	16.00	
LAWJ	002	22	Contracts Anna Gelpern	4.00	B+	13.32	
LAWJ	005	21	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	
LAWJ	008	21	Torts Paul Rothstein	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	41.32	3.44
Cumulative	12.00	12.00	41.32	3.44

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	B+	13.32	
LAWJ	004	22	Constitutional Law I: The Federal System Paul Smith	3.00	A-	11.01	
LAWJ	005	21	Legal Practice: Writing and Analysis Erin Carroll	4.00	A-	14.68	
LAWJ	007	92	Property Neel Sukhatme	4.00	B+	13.32	
LAWJ	1701	50	International Economic Law and Institutions Sean Hagan	3.00	A	12.00	
LAWJ	611	09	Corporate Compliance in the Financial Sector: Anti-Money Laundering and Counter-Terrorism Financing Jonathan Rusch	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	64.33	3.57
Annual	31.00	30.00	105.65	3.52
Cumulative	31.00	30.00	105.65	3.52

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Program Changed to:
Major: Law/Business Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	121	02	Corporations Robert Thompson	4.00	B+	13.32	
LAWJ	1491	03	Externship I Seminar (J.D. Externship Program) Alexander White		NG		
LAWJ	1491	125	~Seminar Alexander White	1.00	A	4.00	
LAWJ	1491	127	~Fieldwork 3cr Alexander White	3.00	P	0.00	
LAWJ	300	05	Accounting for Lawyers Kevin Woody	2.00	B+	6.66	
LAWJ	309	07	Congressional Investigations Seminar Robert Muse	2.00	B+	6.66	
LAWJ	421	05	Federal Income Taxation Emily Satterthwaite	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	45.32	3.49
Cumulative	47.00	43.00	150.97	3.51

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	126	05	Criminal Law Alicia Washington	3.00	A	12.00	
LAWJ	1372	05	Business Essentials: A Mini-MBA for Lawyers Stephen Hills	3.00	A-	11.01	
LAWJ	1492	41	Externship II Seminar (J.D. Externship Program) Tannisha Bell		NG		
LAWJ	1492	89	~Seminar Tannisha Bell	1.00	A-	3.67	
LAWJ	1492	91	~Fieldwork Tannisha Bell	3.00	P	0.00	
LAWJ	1512	05	Constitutional Litigation and the Executive Branch Joshua Matz	2.00	A-	7.34	
LAWJ	396	05	Securities Regulation Donald Langevoort	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	50.02	3.85
Annual	32.00	26.00	95.34	3.67
Cumulative	63.00	56.00	200.99	3.59

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	B+	9.99	
LAWJ	361	09	Professional Responsibility Philip Sechler	2.00	A	8.00	
LAWJ	397	05	Separation of Powers Seminar Paul Clement	3.00	B+	9.99	

----------Continued on Next Page----------

Record of: Katherine M. McMullen
GUID: 819485445

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	42.66	3.56
Cumulative	75.00	68.00	243.65	3.58

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	114	08	Corporate Finance	4.00	P	0.00	
LAWJ	1610	09	Criminal Practice Seminar: White-Collar Crimes in a Transnational Context	2.00	A-	7.34	
LAWJ	1830	05	Corporate Boards Seminar	2.00	A	8.00	
LAWJ	317	07	Negotiations Seminar	3.00	A	12.00	
LAWJ	351	05	Trial Practice	2.00	A	8.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	35.34	3.93
Annual	25.00	21.00	78.00	3.71
Cumulative	88.00	77.00	278.99	3.62

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Katherine McMullen has asked that I write to you in connection with her application for a judicial clerkship. Katherine was a student in my Securities Regulation class during her second year at Georgetown, and although the class was very large, I got to know her very well. Based on that contact and her stellar performance on the final exam, I recommend her to you with enthusiasm.

Katherine is a very focused, engaged law student, especially on matters relating to Her career interest, white-collar crime prosecution and litigation. She was selected to take part in Georgetown's innovative Business Law Scholars program, which adds various enhancements to a demanding business law curriculum. She has done internship/externship programs with the Department of Justice, judges in the District of Columbia and D.C. Superior Court, and U.S. Attorney's Offices in the District of Columbia and District of Maryland. She is exceptionally motivated, entirely in a good way. Her summer clerkship was with Kirkland & Ellis in its Washington D.C. office, which she will be joining full time as an associate after her Georgetown graduation.

I urge you to offer her an interview, so that you can observe for yourself Katherine's level of passion and knowledge. Wisely, she is committed to a district court clerkship for the professional skill building it would offer. Were you to hire Katherine as one of your clerks, you will quickly come to realize what an exceptional young professional she is. Please let me know if I can be of any further assistance.

Sincerely,

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law

Donald Langevoort - langevdc@law.georgetown.edu

ABELL
FOUNDATION

May 15, 2023

Dear Judge:

It is my pleasure to submit this letter of recommendation in support of Katherine McMullen's application for a federal clerkship. Katherine worked directly for me at the Abell Foundation for two and one-half years before attending law school

For over 35 years, I have served as the Chief Financial Officer and Senior Vice President for the Abell Foundation, a non-profit private foundation in Baltimore, Maryland, that is dedicated to fighting urban poverty. In addition, for the last 17 years I have served as the Executive Chairman of Paice LLC, a pioneer in hybrid car technology and an Abell investee.

Abell is a very innovative non-profit on multiple fronts: grant-making, social entrepreneurship and investments. Abell invests in promising local companies – including those focused on medical, technical and environmental advances – with the goal of creating local jobs and reinvesting any earnings back into the community. Consistent with this mission, Abell invested millions of dollars to promote Paice LLC's efforts to develop and promote its innovative-patented hybrid car technology. Abell has also made substantial investments in ThermoChem Recovery International (TRI). TRI's advanced steam reforming gasification technology can transform garbage into drop-in transportation fuel. Katherine worked side by side with me on both Paice and TRI during her time at Abell. Her responsibilities included assisting me in managing complex patent litigation between Paice/Abell and several global automotive manufacturers. She routinely interfaced with the patent lawyers and was a key team player during a very stressful and high stakes trial. Katherine earned the complete respect of the trial team. On TRI, Katherine assisted me with review and analysis of an offering memorandum for green bonds, the Independent Engineer's report and consultants' reports describing the first of a kind Municipal Solid Waste (MSW) to jet-fuel bio refinery.

Katherine has a rare gift of being able to immerse herself in the details but then step back to organize, analyze and present complicated information in a well-written form that is concise, persuasive and understandable. Her intellectual abilities along with her professionalism and maturity prompted me to include her in numerous high-level strategy meetings as well as Paice and TRI board meetings. She took on a wide variety of demanding and complex assignments and completed them in an exemplary manner. Her ability to keep confidential matters confidential was exemplary.

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Katherine has a thirst for knowledge and a passion for research that allow her to gain an in-depth understanding of complex matters. In addition to the key research she did for Paice and TRI, she co-authored an Abell Report titled "Fact Check: A Survey of Available Data on Juvenile Crime in Baltimore City." Katherine performed data analysis and conducted many in-person and phone interviews with stakeholders (a judge, academics, Office of the Public Defender, Department of Juvenile Services and the State's Attorney's Office). She also learned how to use and analyze a SQL database as part of this project. The report can be found on Abell's website and is an excellent example of the caliber of Katherine's work product.

Katherine works well in environments surrounded by smart people trying to figure out difficult problems. She handles ambiguity well and thrives in an environment that is constantly changing. Katherine prefers to learn by interning/doing rather than the classroom which is why, in part, she decided to attend Georgetown Law School.

Katherine has informed me that she would like to work for a private law firm for a few years, then clerk, and then switch into a public sector role, preferably with a federal prosecuting office. A clerkship would allow her the opportunity to wrestle with and learn how to apply the law each day for a dedicated year while further developing her writing skills. She believes that working for a judge to understand how the judge makes the "tough calls" in legal grey areas and weighs sentencing decisions while working with a small team is truly exciting.

Katherine is an amazing young woman and I truly believe a federal clerkship would complement her skillsets and contribute meaningfully to her continued professional growth and career development.

Frances M. Keenan

Frances M. Keenan
Senior Vice-President
Abell Foundation, Inc.

Georgetown Law
600 New Jersey Avenue, NW
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May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a full-time member of the faculty at Georgetown University Law Center's and it is a pleasure to recommend Ms. Katherine McMullen, Georgetown Law '23, who has applied for a clerkship in your chambers. An active and engaged Georgetown student, Ms. McMullen is a member of the Moot Court team (Barrister's Council, Appellate Advocacy Division) and serves on the Georgetown Journal of Legal Ethics. I am confident that Ms. McMullen will be a wonderful law clerk and am delighted to support her application.

I got to know Ms. McMullen in the fall semester of 2021 when she was a 2L student in my upper-level Federal Income Taxation course. Ms. McMullen's performance in Federal Income Taxation was very strong: she earned an A- and was in the top half of the class. In class, she stood out from the beginning because she sat in the front row, was always meticulously prepared, and her performance on panel was stellar. When she wasn't on panel, she occasionally asked questions and their substantive quality was excellent. They were always on-point, well-articulated, and helped advance everyone's learning, thereby giving Ms. McMullen a well-deserved reputation in the class as a talented legal thinker and communicator.

Ms. McMullen also came to my attention on account of her initiative and the strength of her research and writing. In Federal Income Tax, students were permitted to choose a tax question of interest to them that we had not covered in the course and to write a short memorandum addressing it (for extra credit). Ms. McMullen seized the opportunity to do this and her memorandum was one of the strongest in the class. It asked the following: "How does the IRS treat filing for polygamous and other non-dyadic marriages (e.g., polyamorous relationships) in light of the recent decriminalization of polygamy in Utah and loosening of dyadic-centric domestic partnership requirements in certain domestic municipalities?" The answer provided in the memorandum was clear, thoroughly-researched and well-reasoned. It found that, unless such relationships are recognized as a "marriage" under state law, the IRS cannot treat the individual parties to the relationship as married for tax purposes. She concluded that until the Internal Revenue Code adopts a more expansive definition of what it means to be "married" under section 7701 and corresponding regulations, any given two members of a non-dyadic domestic partnership will be denied the benefits that a married couple can receive under the Internal Revenue Code, thus creating an inequity between these different kinds of legal relationships.

Ms. McMullen's background both before and during law school is impressive and well-suited to clerking. After completing her undergraduate studies at Stanford University and working for several years abroad and domestically, Ms. McMullen came to Georgetown Law. She was selected as a Business Law Scholar on account of her interest in studying business law through a litigation lens; she hopes one day to become a prosecutor. During law school, to advance this core interest, she has engaged a wide array of litigation experiences through externships and internships. These include placements in a judicial externship at the U.S. District Court for the District of Columbia (chambers of the Honorable Timothy J. Kelly), a volunteer law student externship at the Department of Justice (Organized Crime and Gang Section), a judicial externship at the Superior Court for the District of Columbia (chambers of the Honorable James A. Crowell IV), a volunteer law student externship at the U.S. Attorney's Office - District of Columbia (Violent Crimes and Narcotics Section), and a summer law student internship at the U.S. Attorney's Office - District of Maryland.

In addition to Ms. McMullen's academic skills and preparation, she is a kind and curious person. It is always a pleasure to interact with her inside and outside of class. In this regard, she is quick to use her many skills to help others. One example of this is her volunteer work with the organization Thread.org as a "Head of Family" to an at-risk Baltimore ninth grader.

In sum, Ms. McMullen is extremely well-qualified to be a clerk in your chambers and would be a marvelous addition to your community. Her combination of excellent analytical, research, and writing skills along with her interpersonal abilities make it easy for me to enthusiastically recommend her.

I would be happy to discuss further any aspect of this letter or Ms. McMullen's application. Please do not hesitate to contact me if I can be of assistance.

Sincerely yours,

Emily Satterthwaite

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Writing Sample

The attached writing sample is the argument section of a brief I wrote when competing in the Beaudry Moot Court Competition at Georgetown University Law Center in 2021. The two questions discussed in the brief were: whether the legislative prayer doctrine applies to Hotung School District's school board meetings, and whether the prayer policy of that school district violates the Establishment Clause. The case took place on appeal from a hypothetical Thirteenth Circuit. The competition used a closed packet, and as part of the closed packet, certain reporter numbers and case names were modified. Thus, case names, reporter and page numbers may not correspond exactly to their real-life counterparts. The paper has not been edited by third parties and is my own work product.

SUMMARY OF ARGUMENT

The Hotung School District Board of Education's 2011 policy of solemnization of proceedings through an invocation falls under the Legislative Prayer Doctrine Exception to the Establishment Clause. The Establishment Clause of the First Amendment to the Constitution prohibits any government policy that effectively forces religion or religious practice onto its citizens. There is generally a clear line separating religious and state practice, with school-sponsored prayer almost universally illegal. There is a narrow exception, however, for invocations that begin sessions of legislative bodies. The exception exists largely because of the historical tradition of solemnizing proceedings through prayer, with case law including school boards within legislative bodies. Therefore, the Thirteenth Circuit correctly decided on appeal that Hotung's policy falls within the narrow legislative prayer exception because the Hotung Board centered its policy on solemnization, and historical tradition allows for such conduct.

Though the Board's conduct rightly falls within the legislative prayer exception, even if this Court disagrees, Hotung's policy survives scrutiny under the Establishment Clause analysis developed in *Lemon v. Kurtzman*. The analysis looks at a policy's purpose, primary effect, and whether or not it is an excessive entanglement of the government with religion. Hotung's express purpose for the policy was solemnization of school board meetings and promotion of the religious diversity of the district. Because of its secular purpose and dedication to removing the Board from direct decision-making regarding the content and provider of the invocation, the primary effect of the policy does not advance religion. In the same vein, because the Hotung Board has removed itself from direct control over the invocation, it has removed its policy from danger of excessive entanglement with religion.

ARGUMENT

I. The legislative prayer doctrine applies to the Hotung School District Board of Education's policy of community-sourced religious leaders conducting invocations at its meetings.

A. This case is a question of legislative body invocation—rather than of school prayer—because of the nature of the work of the Hotung Board and historical tradition governing similar practice.

"A single factual difference… can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition… The issue of prayer at school board meetings is no different." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999). School-sponsored prayer is a per se violation of the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577 (1992) (finding religious exercises conducted at a public high school graduation ceremony are school prayer and thus violate the Establishment Clause). However, the practice of solemnization of a meeting of a legislative body with a religion-adjacent moment is a narrow exception to the general Establishment Clause doctrine. *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Nebraska Legislature's practice of opening each legislative session with a prayer by a State-remunerated chaplain does not violate the Establishment Clause); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (holding *Marsh* applicable to town board meetings). The courts have extended this traditional legislative prayer exception beyond state and federal legislatures, "to local deliberative bodies" like city councils and school boards, though the issue of the exception's applicability to school boards is still fact-sensitive. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494 (6th Cir. 2017) (holding legislative prayer exception extends to local deliberative bodies like city councils); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 527 (5th Cir. 2017) (extends *Town of Greece* to prayers before school boards); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011)

(applies *Lee* to issue of school board meeting prayer led by board members); *Coles*, 171 F.3d at 377 (applies *Lee* to issue of school board meeting prayer conducted, at times, in a schoolhouse).

The Third, Fifth and Sixth Circuits have each examined whether prayer performed before school board meetings falls under the legislative prayer doctrine exception. *See, e.g.*, *Coles*, 171 F.3d at 369; *McCarty*, 851 F.3d at 521; *Indian River*, 653 F.3d at 256. In *Coles*, the Sixth Circuit held that prayer before meetings of the Cleveland School Board fell under *Lee* rather than *Town of Greece* because the meetings "are part of the same 'class'" as other activities like school graduation ceremonies and football games "in that they take place on school property and are inextricably intertwined with the public school system[.]" *Coles*, 171 F.3d at 377. Because board meetings are in this same class of activities, the Cleveland Board must be directing the entirety of its meeting's proceedings to its constituencies—the students. *Id.* The Sixth Circuit looked specifically to the audience and setting of the legislative activities of the Cleveland School Board in making the determination that *Lee* should govern the case. The Cleveland School Board conducted meetings on school property—even on occasion within a schoolhouse—which were attended by students who "[were] directly involved in the discussion and debate at school board meetings." *Id.* at 382. By comparison, in the present matter, Hotung's school board holds meetings in the District Administration Building or the local community theater, neither of which is a school. 548 F.4d at 206; 126 F. Supp. 4th at 138. The court in *Lee* noted it was issuing a limited ruling in response to the "sole question" of "whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." *Lee*, 505 U.S. at 599. The issue in *Coles*, however, is of a more nuanced nature than the clear bright line ruling of *Lee*. Similarly, the Third Circuit in *Indian River* did not adequately substantiate why *Lee* held sway over the matter. *Indian River*,

653 F.3d at 270 (stating only "[h]aving decided that this case is controlled by the principles in *Lee v. Weisman*, we must next decide whether the Indian River Policy violates the Establishment Clause" without further substantiation). Further, as the Sixth Circuit noted in *Bormuth*, the Fifth Circuit has applied *Town of Greece* to prayers before school boards. *Bormuth*, 870 F.3d at 505 (citing *McCarty*). Therefore, since *Lee* is unconvincingly applicable to the present matter, the fact-sensitive inquiry typified in *Town of Greece* must govern.

B. A fact-sensitive inquiry into the Board's policy emphasizes the Board remains squarely within the legislative prayer exception and does not compel its citizens to religious observance.

Opening meetings of legislative bodies with prayer "is not subject to typical Establishment Clause analysis because such practice 'was accepted by the Framers and has withstood the critical scrutiny of time and political change.'" *McDonough Found.*, 126 F. Supp. 4th at 139 (quoting, in part, *Town of Greece*, 572 U.S. at 577); *Town of Greece*, 572 U.S. at 575 (noting the Court in *Marsh* "sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry," because of historical tradition). However, the prayers, or moments of solemnization, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Town of Greece*, 572 U.S. at 585. The principal audience of the prayers must also be the lawmakers themselves, and not the attending public. *Id.* at 587. In sum, the courts must perform a fact-sensitive inquiry examining the audience, setting, board influence on the prayer giver and prayer content, and historical tradition, in determining whether an organization has violated the legislative prayer doctrine and thus is forcing undue compulsory religious practice on its citizen. *Id.*

i. The audience of the Hotung Board's policy is primarily the board members.

The audience for a legislative prayer must be principally the legislatures themselves, rather than a secondary audience, though the secondary audience may be present. *Town of*

Greece, 572 U.S. at 587. Special consideration is also given to the presence of children at the proceedings, due to their vulnerability to peer pressure. *Lee*, 505 U.S. at 593; *McDonough Found.*, 548 F.4d at 210. However, as the Circuit Court noted, "the presence of students at board meetings does not transform this into a [*Lee*] school prayer case. There were children present at the town board meetings in *Town of Greece*… [and] the Court nonetheless applied the legislative prayer exception." *McDonough Found.*, 548 F.4d at 210. What is of great importance, however, is the actions of the board itself—if members of the board "directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity," then the policy would likely tip the inquiry against a legislative exception. *Town of Greece*, 572 U.S. at 587. The Hotung Board does no such thing—though there are students present at the meeting, the Board does not force any student into compulsory participation. Further, through the varied nature of speakers at the meetings, the two students who sit in on all Hotung Board meetings as members of the Student Advisory Council are not exposed to a continual march of one religion or prayer-type—they are exposed to the full diversity of offerings in the district, secular and non-secular.

ii. The setting of the Hotung Board meetings reiterates the separation of religious, school-day and governmental activity.

The Hotung Board conducts its meetings on non-school property either at a District Administration building or at a local community theater. For these reasons, the meetings are physically and sentimentally removed from the bounds of the school day, thereby providing a clear delineation between what is school and what is not school. Because of this clear line, Hotung satisfies this aspect of the *Town of Greece* inquiry.

iii. Hotung School Board remains multiple steps removed from the day-to-day selection of prayer giver and prayer content, thereby preventing its slide into school prayer territory.

The court looks to the activities of the legislative body as a whole when considering legislative prayer. *Lund v. Rowan Cnty., N.C.*, 837 F.3d 407, 421 (4th Cir. 2016). The identity of the prayer or invocation giver is generally "constitutionally insignificant;" rather, what is of significance is whether discrimination against certain speakers preventing their participation has occurred. *Id.* at 424. Further, "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece*, 572 U.S. at 582. Finally, "'[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,' a constitutional line can be crossed… To this end, courts need only assure themselves that sectarian legislative prayer, viewed from a cumulative perspective, is not being exploited to proselytize or disparage." *Lund*, 837 F.3d at 421.

When examined holistically, Hotung's policy does not violate this inquiry. The Board's policy removes the Board from directly influencing the content of the prayers. It further removes the Board, in general, from the picking of religious leaders within the community to lead each meeting's invocation. It is only when a religious leader has not sought out the invocation spot at a particular meeting that the Board must name someone to give the invocation, and at that point the policy requires the Board to select a leader from the list at random. Further, the policy prevents religious leaders from speaking at consecutive meetings, thereby eliminating a key path to tipping the scales toward proselytization. The content of the invocations is not used to disparage other religions—though the content of the invocations is beyond the Board's control, the McDonough Foundation has not alleged the contents of the invocations disparage other

religions. Even if McDonough could point to a specific invocation or prayer that did disparage another religion, "*Town of Greece* 'requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer.'" *Id.* at 422.

iv. Against the backdrop of historical tradition, Hotung remains firmly within the bounds of the legislative prayer doctrine.

The Thirteenth Circuit found that dating from the early 1800s—a time when the United States had hardly more than the thirteen original colonies it began with—"at least eight states had some history of opening prayers at school board meetings." *McDonough Found.,* 548 F.4d at 209. In *Bormuth*, the Sixth Circuit found that the "tradition [of legislative prayer] extends not just to state and federal legislatures, but also to local deliberative bodies like city councils" *and* school boards. *Bormuth,* 780 F.3d at 505 (referencing *McCarty,* 851 F.3d 521). Hotung "is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. In no respect is it less a deliberative body than was the town board in *Town of Greece*." *McDonough Found.,* 548 F.4d at 208–209. Taken together, the Hotung Board is firmly within the legislative prayer doctrine because of the combination of the historically traditional practice of legislative prayer, and its application both to school boards specifically and schools boards by analogy (a legislature is a legislature is a legislature).

II. Even if this court finds the legislative prayer doctrine does not govern the present matter, the Hotung School Board is not in violation of the Establishment Clause as it satisfies *Lemon*.

A. The Lemon test governs as it is the go-to test this Court relies on in cases concerning school prayer.

To determine whether a matter violates the Establishment Clause, the courts look to *Lemon v. Kurtzman* and the so-called *Lemon* test: "a court must inquire (1) whether the government has the purpose of endorsing religion, (2) whether the effect of the government's

action is to endorse religion, and (3) whether the policy or practice fosters an excessive entanglement between government and religion." *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1982)). In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this court applied the "endorsement test" as opposed to the *Lemon* test. However, the endorsement test and the second prong of the *Lemon* test are virtually indistinguishable. *Indian River*, 653 F.3d at 282 (noting the endorsement test and the second *Lemon* prong are essentially the same, citing to *Black Horse Pike*, 84 F.3d at 1486); *Mellen*, 327 F.3d at 368 (holding the endorsement test is a refinement of *Lemon*'s second prong).

B. Hotung passes the first prong of the Lemon test because of the Board's policy's clear, secular purpose.

To apply the first prong of *Lemon*, "we ask 'whether [the] government's actual purpose is to endorse or disapprove of religion.'" *Indian River*, 653 F.3d at 283 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). The statute need not have exclusively secular objectives; "the 'touchstone' is neutrality" with the government only violating the Establishment Clause when it "acts with the ostensible and predominant purpose of advancing religion." *Mellen*, 327 F.3d at 742 (quoting *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005)). The secular purpose must be sincere and not a sham, with the board or government's stated purpose afforded some deference. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 (6th Cir. 2001) ("Unless it seems to be a sham... the government's assertion of a legitimate secular purpose is entitled to deference." *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 (6th Cir. 2000)); *Indian River*, 653 F.3d at 283; *Mellen*, 327 F.3d at 372–73.

In the present matter, the policy's "stated purpose is the solemnization of Board meetings and honoring the diversity of religion in Hotung." *McDonough Found.*, 126 F. Supp. 4th at 138.

The District Court here decided because two Hotung board members had made statements using Christian concepts, "the prayer policy's provision for a solemnizing invocation does not constitute a permissible secular purpose," adding, "[t]here is no secular reason to limit the solemnization to prayers." *Id.* at 144. However, in *Mellen*, the Fourth Circuit held a policy of prayer before compulsory dinners at a state-funded university still passed the first prong of *Lemon*. In *Mellen*, the purpose of the prayer was to "promote religious tolerance, [educate] cadets about religion, and get 'students to engage with their own beliefs.'" *Mellen*, 327 F.3d at 373. The Fourth Circuit strongly expressed doubt about the stated purpose ("we are concerned") but afforded the policy's stated purpose deference, stating, "[w]e are inclined to agree that the purpose of an official school prayer 'is plainly religious in nature' ... however, we will accord [the government] the benefit of all doubt and credit [their] explanation of the prayer's purposes." *Id.* at 374. Hotung's stated aim is secular in rhetoric and in purpose. Therefore, this court should follow the case law, and affirm the Circuit Court's finding that Hotung's stated purpose does not violate the first prong of the *Lemon* test.

C. The primary effect of the Hotung Board's solemnization of proceedings does not advance religion, thereby green-lighting Hotung on the second prong of the Lemon test.

The second prong of *Lemon* demands that a governmental practice not advance or inhibit religion, regardless of its purpose. *Indian River*, 653 F.3d at 284; *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1380 (3d Cir. 1990). Objectively and through the viewpoint of a reasonable observer, the court examines the totality of evidence, including the "history and ubiquity" of the practice. *Indian River*, 653 F.3d at 284 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)); *Mellen*, 327 F.3d at 374 (noting "this 'primary effect' prong must be assessed objectively"). The second prong asks "whether, irrespective of government's actual purpose, the

practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Mellen*, 327 F.3d at 374 (quoting *Wallace v. Jaffree*, 472 U.S. at 56 n. 42).

Hotung's practice of allowing community religious leaders to provide the invocation at the board meetings on a first come first served basis is the initial bulwark against a violation of the second prong of *Lemon*. By structurally distancing itself from the selection of the prayer-giver, Hotung effectively washes its hands of an endorsement or opposition of religion in the practice. This clear removal from influence is further strengthened by Hotung's method of adding religious leaders to its list:

> The Board compiles a list of eligible leaders by searching the internet, soliciting references from fellow community members, and consulting with the chamber of commerce. A religious leader may also request to be added to the list... The local fire department, law enforcement, and military installation chaplains are automatically added… The policy specifically states that the Board must make every possible effort to schedule a variety of religious speakers and no religious leader may speak at two meetings in a row.

McDonough Found., 126 F. Supp. 4th at 138.

The District Court in its ruling did not elaborate on its reasoning for why Hotung violated the second prong of *Lemon*. In *Indian River*, the school board began their meetings with a prayer, with the stated purpose to solemnize the proceedings. 653 F.3d at 261. The Third Circuit found in that case that "the largely religious content of the prayers would suggest to a reasonable person that the primary effect of the Policy is to promote Christianity," and thus violated the second prong of *Lemon*. *Id.* at 284. At first glance, the Indian River School Board and Hotung's Board seem to be two sides of the same coin, but there is a key difference distinguishing the two—the school board in *Indian River* rotated its prayer-giving through members of its board, while Hotung removed the act of prayer-giving from its board members in almost all circumstances. *Id.* at 262; *McDonough Found.*, 548 F.4d at 206; *McDonough Found.*, 126 F.

Supp. 4th at 138. Taken at the totality of circumstances level, to the reasonable observer, a rotating group of religious leaders does not convey the same endorsement as board members directly leading prayer. Further, in the legislative prayer context discussed previously, this Court has acknowledged that even a chaplain's sixteen-year consecutive term in prayer-giving before legislative body meetings is not enough to violate the Establishment Clause when the chaplain "was reappointed because [of] his performance and personal qualities [being] acceptable to the body appointing him." *Marsh*, 463 U.S. at 793. Therefore, Hotung's removal of the Board from direct decision-making, combined with the makeup of its list of speakers, and policy preventing consecutive meetings led by the same speaker, cement the Board's compliance with the second *Lemon* prong.

D. Hotung's solemnization of its meetings, through its content-neutral selection policies, does not result in excessive entanglement with religion thereby passing the third prong of Lemon.

The third prong of *Lemon* provides that a government practice may "not foster an excessive government entanglement with religion." *Indian River*, 653 F.3d at 288. Excessive entanglement entails an examination of the "character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). "'The usual setting for an entanglement clause violation is when a state official… must make determinations as to what activity or material is religious in nature, and what is secular and therefore permissible' … A content-neutral access policy eliminates the need for these distinctions." *Gregoire*, 907 F.2d at 1381 (quoting, in part, *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 555 (3d Cir. 1984)). Entanglement is also limited to institutional entanglement. *ACLU of Ohio*, 243 F.3d at 308 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 689 (O'Connor, J., concurring)). However, some interaction between church and state has "always

been 'tolerated,'" therefore a complete separation is not expected. *Indian River*, 653 F.3d at 288 (quoting *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (Alito, J.)).

In *Coles*, a case in which the courts examined a school board's policy of beginning meetings with prayer, the Sixth Circuit found "excessive entanglement where '[t]he school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and ... had the school board president himself compose and deliver prayers to those in the audience." *Mellen*, 327 F.3d at 374 (citing *Coles*, 171 F.3d at 385). No such issues are found in the case at bar. The president of the Hotung Board does not himself compose and deliver prayers to those in the audience. He does not ordinarily choose which members of the religious community lead the moments of solemnization. Further, the Hotung Board has historically begun its meetings with a solemnization proceeding and memorialized it in a policy after a period of time. *McDonough Found.*, 126 F. Supp. 4th at 138. The school board president in *Coles*, however, implemented the policy and proceeding simultaneously, effectively making the invocation of prayer a board decision. *Coles*, 171 F.3d at 373.

In *Gregoire*, the Third Circuit held that in order to not violate the Establishment Clause, the Centennial School District could not ban usage of its facilities "for religious purposes" because it would require the School District to illegally entangle itself in "what would almost certainly be complex content-determinations." 907 F.2d at 1382. The Third Circuit maintained a content-neutral access policy would alleviate this issue. *Id.* at 1381. Hotung has such a content-neutral approach, allowing it further freedom from an excessive entanglement clause violation.

For these reasons, Hotung has not violated the third prong of *Lemon*.

Applicant Details

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Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**NYU Journal of Law & Business**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

7 Cornelia Street, Apt. 4B
New York, NY 10014
(202) 412-9938
smehring@stroock.com

June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a 2022 graduate of New York University School of Law, where I was recognized as a McKay Scholar (for being in the top twenty-five percent of students after four semesters) and graduated cum laude. I am currently a first year associate at Stroock & Stroock & Lavan LLP. I am writing to apply for a clerkship in your chambers for the 2024-2025 Term.

Enclosed for your review are my resume, law school transcript, undergraduate transcript, and two writing samples. One sample is a reply memorandum of law, of which I wrote three sections, filed in *Martinez v. City of New York*, Index No. 152989/2023, (Sup. Ct. N.Y. Cnty. May 10, 2023). The other is a hypothetical petition for a writ of certiorari I wrote for a course I took in Spring 2021, Constitutional Litigation. Arriving under separate cover are letters of recommendation from the following people:

- Professor Bethany Davis-Noll, bethany.davisnoll@nyu.edu, (212) 998-6239
- Professor Michael Bosworth, msb391@nyu.edu, (917) 596-3153
- Associate Landon Reid, lreid@stroock.com, (212) 806-1225

Please feel free to contact me should you need any additional information. Thank you for your consideration.

Respectfully,

Samantha Mehring

Enclosures

SAMANTHA MEHRING
7 Cornelia Street
New York, NY 10014
(202) 412-9938
smehring@stroock.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., *cum laude*, May 2022
Honors: *Journal of Law & Business*, Articles Editor
Orin S. Marden Moot Court Competition Semifinalist
Activities: Professor Bethany Davis-Noll, Research Assistant (Spring 2022)
Graduate Lawyering Program, Teaching Assistant (Fall 2021)
Global Justice Clinic, Student Advocate (Fall 2020-Spring 2021)

COLLEGE OF WILLIAM & MARY, Williamsburg, VA
B.A. in International Relations, *summa cum laude*, May 2019
Minor: Economics
Honors: James Monroe Scholar
Dean's List (all semesters)
Activities: Club Field Hockey
Chi Omega Sorority, Philanthropy Director

EXPERIENCE

STROOCK & STROOCK & LAVAN LLP, New York, NY
Associate, October 2022-present
Research legal issues related to labor law, breach of contract, election law, FOIA requests, and will contests. Assist in drafting motions and briefs. Represent class members in a class action lawsuit.

Summer Associate, Summer 2021
Researched associational discrimination, breach of contract, and labor law issues. Assisted in drafting memoranda, preparing for depositions, and writing articles for publication.

CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, New York, NY
Legal Intern, Summer 2020
Conducted legal research on the intersection of government policy with the privatization of key sectors and drafted memoranda summarizing findings. Monitored ongoing litigation for relevant priorities and projects.

AIDDATA RESEARCH LAB, Williamsburg, VA
Research Assistant, February 2018-January 2019
Helped develop a database that AidData uses to understand the interactions between development organizations and policy-makers on the ground. Translated and edited translations of documents between French and English.

COLLEGE OF WILLIAM & MARY, Williamsburg, VA
Economics Department Teaching Assistant, August 2018-December 2018
Held weekly office hours to provide guidance and assistance to students taking Principles/Methods of Statistics. Held test review sessions for students to ask questions, go over lecture material, and prepare for upcoming exams.

MULTILATERAL INVESTMENT GUARANTEE AGENCY, Washington, DC
Environmental and Social Intern, June 2018-August 2018
Conducted contextual risk and Integrated Biodiversity Assessment Tool (IBAT) analysis of assigned projects. Provided input on internal reports, memoranda, and presentations.

ADDITIONAL INFORMATION

Enjoy long-distance running, traveling, and *The West Wing*.

Name: Samantha B Mehring
Print Date: 05/08/2023
Student ID: N10691352
Institution ID: 002785
Page: 1 of 2

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/18/2022
School of Law
Honors: cum laude
Major: Law

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Amanda S Sen			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Social Movement Lawyering			
Instructor: Deborah L Axt			
Sarah E Burns			
Andrew David Friedman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Constitutional Law	LAW-LW 10598	4.0	CR
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Anna Arons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Social Movement Lawyering			
Instructor: Deborah L Axt			
Sarah E Burns			
Andrew David Friedman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Global Justice Clinic	LAW-LW 10679	3.0	A-
Instructor: Margaret Lockwood Satterthwaite			
Elizabeth Happel			
Global Justice Clinic Seminar	LAW-LW 11210	4.0	A-
Instructor: Margaret Lockwood Satterthwaite			
Elizabeth Happel			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B
Instructor: William E Nelson			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff			
Arthur R Miller			
Constitutional Litigation Seminar	LAW-LW 10202	2.0	A
Instructor: John G Koeltl			
Global Justice Clinic	LAW-LW 10679	3.0	A
Instructor: Margaret Lockwood Satterthwaite			
Elizabeth Happel			
Global Justice Clinic Seminar	LAW-LW 11210	3.0	A
Instructor: Margaret Lockwood Satterthwaite			
Elizabeth Happel			
The Executive and Criminal Justice Reform Seminar	LAW-LW 12581	2.0	A
Instructor: Michael S Bosworth			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Andrew Weissmann			
Corporations	LAW-LW 10644	4.0	A
Instructor: Ryan J Bubb			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Alice Estill Burke			
Labor and Employment Law Seminar	LAW-LW 11681	2.0	A
Instructor: Samuel Estreicher			
Racial Justice and the Law	LAW-LW 12241	2.0	CR
Instructor: Bryan A Stevenson			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	71.0	71.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Government Lawyering at the State Level Seminar	LAW-LW 11303	2.0	A
Instructor: Bethany Davis Noll			
Journal of Law and Business	LAW-LW 11317	1.0	CR
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Helen Hershkoff			
Property	LAW-LW 11783	4.0	B+

Name:	**Samantha B Mehring**
Print Date:	**05/08/2023**
Student ID:	**N10691352**
Institution ID:	**002785**
Page:	**2 of 2**

Instructor: Frank K Upham

	AHRS	EHRS
Current	12.0	12.0
Cumulative	83.0	83.0

Staff Editor - Journal of Law & Business 2020-2021
Article Editor - Journal of Law & Business 2021-2022

End of School of Law Record

State Energy &
Environmental Impact Center
NYU School of Law

June 16, 2023

RE: Samantha Mehring, NYU Law '22

Your Honor:

I am the Executive Director of the State Energy & Environmental Impact Center and an Adjunct Professor at NYU School of Law. I am writing to recommend Samantha Mehring for a clerkship in your chambers. After working with and teaching her, I can tell you without a doubt that she would be an excellent clerk and I highly recommend her.

I first met Samantha when she took my course in the spring of 2022. I teach a class at NYU School of Law on government lawyering. In the class, we focus on the role of attorneys general (AGs) in defending and advocating for policy at the state and federal levels. Sam's participation in class was quite wonderful. She was respectful and asked good questions. Each student had to present on several different topics and Sam's presentations were professional and easy to follow. I also loved her paper. She took on a standard critique of many state AG settlements and completely undid it. I was impressed! Her writing was well-researched and clear as well, which made it that much more pleasant to read.

During the semester, I also recruited Sam to work as a research assistant for me. She helped me write a section of a paper that is about a role of state attorneys general in a just transition. It was a challenging project, because states face strict preemption for a lot of labor-related policy. But Sam did an excellent job harnessing the readings from our class as well as other research to pull together a list of factors that make it more or less likely for an attorney general to decide to get involved in an issue. She also used her background in labor law to guide me, which I really appreciated. We then used those factors to analyze a role for AGs in protecting workers in the growing clean energy sector. Last but not least, thanks to her discipline and organization we got through the project in an efficient manner during the semester—and I did not have to worry about interfering with finals at the end of the semester. It was a joy to work with her both because of that and because of her substantive contributions. A copy of the paper she helped with can be found here: https://digitalcommons.pace.edu/pelr/vol40/iss1/7/.

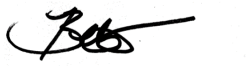
I clerked twice and based on that experience I think that Sam is well prepared for a clerkship and that she will be an asset to your chambers should you decide to hire her! She is self-directed and trustworthy. Her grades are quite good, demonstrating that she is a hard

The State Energy & Environmental Impact Center
New York University School of Law • Wilf Hall, 139 MacDougal St., 1st Fl. • New York, NY 10012
stateimpactcenter@nyu.edu

worker who can communicate and who is good at issue spotting and everything else we teach in law school. I can also tell you that she is respectful and will be a very good colleague to her peers.

I am very happy to answer any questions about Sam. I can be reached at 646-612-3458; bethany.davisnoll@nyu.edu.

All my best,



Bethany Davis Noll

Writing Sample
Samantha Mehring

I wrote sections I, III, and V of the below excerpted reply memorandum of law, filed in *Martinez v. City of New York*, Index No. 152989/2023, (Sup. Ct. N.Y. Cnty. May 10, 2023). As an associate at Stroock & Stroock & Lavan LLP, I helped represent six New York City voters against the City of New York in this lawsuit. We challenged the constitutionality of Local Law #15, a law passed by the City Council of New York that bars residents from voting for candidates who have been convicted of certain public corruption crimes. We challenged the law based on its violation of the First Amendment right of association, preemption, and its violation of the Municipal Home Rule Law and New York City Charter. The City of New York argued that Plaintiffs lacked standing to bring this lawsuit, that this lawsuit was barred by laches, and that Local Law #15 was otherwise constitutional. I have included below the sections of the reply memorandum of law that I wrote: the sections addressing standing (section I), Local Law #15's violation of the First Amendment right of association (section III), and Local Law #15's violation of the Municipal Home Rule Law and New York City Charter (section V). I received permission from the firm to use this reply memorandum of law as a writing sample. Attorneys at Stroock & Stroock & Lavan lightly edited my writing in these sections.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ILEANA MARTINEZ, CARMEN BOBADILLA, YVETTE C. JETER, MINISTER SHERMAN TERRY LEWIS, RAFELINA MORENO, and FRANCISCO ROSADO,	Index No. 152989/2023
Plaintiffs,	Moton Seq. No. 1
-against-	
THE CITY OF NEW YORK,	
Defendant.	

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY RELIEF PURSUANT TO CPLR § 3211(C)

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038-4892
(212) 806-5400

Attorneys for Plaintiffs

Of Counsel:

Jerry H. Goldfeder
David J. Kahne
Michael G. Mallon
Elizabeth C. Milburn
Samantha Mehring

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PRELIMINARY STATEMENT

The issue before the Court is straightforward. Local Law #15 is unconstitutional, preempted by New York State law, and unlawful for not having been enacted through a voter referendum. There are no factual disputes. As such, because the City has explicitly urged this Court to adopt its cross-motion to dismiss, the Court has the authority to treat the parties' respective arguments as requests for summary judgment pursuant CPLR § 3211(c), and, respectfully, that is exactly what this Court should do.

The City resists having this Court reach the merits on the invalidity of Local Law #15, raising arguments, as so many defenders of invalid statutes do, that Plaintiffs lack standing to question the law or that they should have brought this case two years ago (when the City would no doubt have argued there was no injury yet).

Of course, voters have every right to attack a statute that deprives them of their ability to associate with each other and their preferred candidate as an election approaches. Constitutional jurisprudence is unambiguously clear on this point.

The City would have this Court believe that Plaintiffs cannot bring this case now, although this is the precise time when Local Law #15 directly impacts their right to vote. Plaintiffs could not have brought it before they sought to place their preferred candidate on the ballot – any time before now would have rendered such an action premature. This action is ripe only now. Plaintiffs are directly impacted and they have standing to sue.

ARGUMENT

I. PLAINTIFFS HAVE STANDING IN THIS ACTION

The City's argument that Plaintiffs lack standing to challenge Local Law #15 is wrong. These voters plainly have standing to redress the deprivations of their rights.

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First, the City intentionally misconstrues this action. It asserts that "[t]o the extent that Plaintiffs claim a right to litigate the validity – directly or indirectly – of a designating petition, they are wrong" because voters do not have standing to bring Election Law Article 16 proceedings seeking to validate or invalidate designating petitions. Def.'s Mem. 4.[1] This is a bogus argument. As the City is well aware, this action was not brought as an Article 16 proceeding. Respectfully, the Court should not be distracted by the City's straw-man claim.

Rather, Plaintiffs' case is brought as a plenary action, which they have every right to bring, challenging a law that, if implemented, will have a direct and irreparable impact on them—it will prevent them from voting for their preferred candidate.

The United States Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and its progeny, articulated the constitutional jurisprudence on behalf of voters challenging a statute that improperly prevented them from voting for the candidate of their choice. There, voters in Ohio were stymied from voting for a candidate because that candidate failed to file nominating petitions by a specific date. And even though the candidate was also directly impacted, it was the voters whose rights were addressed by the Court and ultimately sustained by the invalidation of the statute (which, it should be added, had been enacted years before). *See also Kusper v. Pontikes,* 414 U.S. 51 (1973) (voter had standing to challenge years-old statute preventing her from voting in a primary because she voted in another party's primary during the previous 23 months).

The criterion required to establish standing is clear, and Plaintiffs easily meet it. Plaintiffs can maintain an action when they have suffered an injury due to the challenged statute. *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772–73, 774 (1991). It is

[1] References to the City's Memorandum of Law in Opposition, ECF Doc. # 30, are noted as "Def.'s Mem. XX"

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unambiguous that Plaintiffs here are harmed, irreparably, by Local Law #15 because the law indisputably prevents them from voting for a specific candidate. As such, the Plaintiffs are in the same position as those in *Anderson, Kusper,* and a legion of cases in which voters can sue to invalidate a statute that impairs their ability to cast a ballot.[2]

Indeed, New York State and federal courts routinely find standing where voters seek to redress deprivations of constitutional rights, preemption, and referendum-related claims. *See, e.g., Yang v. Kellner*, 458 F. Supp. 3d 199, 202 (S.D.N.Y. 2020), *aff'd sub nom. Yang v. Kosinski*, 805 F. App'x 63 (2d Cir. 2020), and *aff'd sub nom. Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020); Decision & Order, *Fossella v. Adams*, Index No. 85007/2022, ECF Doc. # 174 (Sup. Ct. Richmond Cnty. June 27, 2022).[3] It is telling that the City instead relies upon the irrelevant argument that voters cannot bring a case under Election Law Article 16, when the instant case is obviously not that. There is no legitimate argument to support a challenge to Plaintiffs' standing in this action.

II. THE DOCTRINE OF LACHES DOES NOT APPLY

Next, the City's allegation that "laches" prevents this Court from reaching the merits has no basis, and is another attempt to persuade the Court to avoid the merits.

At its core, laches is an equitable defense that can only be "asserted where neglect in promptly asserting a claim for relief results in prejudice to a defendant…." *Stancioff v. Estate of Danielson*, No. 162883/2015, 2018 WL 6930264, at *5 (Sup. Ct. N.Y. Cnty. Dec. 31, 2018). The City has not shown any prejudice whatsoever. If this Court determines that Local Law #15

[2] *See, e.g., Munro v. Socialist Workers Party,* 479 U.S. 189 (1986); *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986).

[3] *See also Price v. New York State Bd. of Elections*, 540 F.3d 101, 104 (2d Cir. 2008); *Saratoga Cnty. Chamber of Com. v. Pataki*, 275 A.D.2d 145, 156 (3d Dep't 2000); *Phelan v. City of Buffalo*, 54 A.D.2d 262 (4th Dep't 1976).

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rationales and excuses. Raising the equitable doctrine of laches with such unclean hands is not countenanced by courts, and, respectfully, should not be countenanced here.

In short, the laches argument has no merit and should not prevent this Court from reaching the merits and invalidating Local Law #15.

III. LOCAL LAW #15 VIOLATES PLAINTIFFS' FIRST AMENDMENT ASSOCIATIONAL RIGHTS

Plaintiffs' First Amendment right of association is infringed because Local Law #15 prevents them from associating with each other and their preferred candidate. Indeed, it does so without articulating a compelling state interest.

The City first argues that Plaintiffs have no rights concerning the structure and organization of state and local government. This is a red herring—Plaintiffs do not claim such rights, nor are Plaintiffs' arguments reliant on such rights. The City then argues that Local Law #15 does not violate Plaintiffs' associational rights because candidates, not voters, are injured by Local Law #15. Pointing to *Rosenstock v. Scaringe*, the City argues, "the direct impact of [a law limiting eligibility to hold public office] is not on one's right to vote, but on an individual's right to hold public office…." Def.'s Mem. 10 (quoting 40 N.Y.2d 563, 564 (1976)). A page later, however, the City acknowledges that "[b]ecause 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.'" Def.'s Mem. 11 (quoting *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972)). *See also Price*, 540 F.3d at 107–08 (2d Cir. 2008) (where (as here) a law governs selection and eligibility of a candidate, it "inevitably affects … the individual's right to vote and his right to associate with others for political ends.") (citation omitted).

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The City next asserts that individuals "do not have a protected interest in being elected to or holding public office…."[5] Def's Mem. 11. This is another red herring: Plaintiffs are asserting their rights *as voters* to associate with the candidate of their choice. Plaintiffs do not assert the right to be a candidate.

In a final effort, the City asserts that "such qualification laws are routinely upheld." Def.'s Mem. 11. The City is wrong. The City relies on *Clements v. Fashing* for the proposition that "[c]lassifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." 457 U.S. at 963. However, in the next sentence of *Clements*, the U.S. Supreme Court states that such leniency is not accorded "when the challenged statute places burdens upon […] a constitutional right that is deemed to be 'fundamental.'" *Id.* (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). The City cannot seriously challenge the fundamental nature of the right of association or the right to vote under the federal and state constitutions. *See, e.g., Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote … or, as here, the freedom of political association.") (internal citation omitted). Given that courts uniformly recognize the right to associate as a fundamental right, the City's assertion that Local Law #15 should be "set aside only if [it is] based solely on reasons totally unrelated to the pursuit

[5] Omitting that strict scrutiny applies when an "identifiable class has been disenfranchised," *Rosenstock*, 40 N.Y.2d at 564, the City baldly asserts that "[c]ourts have uniformly held that persons do not have a protected interest in being elected to or holding public office and the existence of barriers to a candidacy do not even 'compel close scrutiny.' *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Murray v. Cuomo*, 460 F. Supp. 3d 430, 443 (S.D.N.Y. 2020) ('[T]here is no freestanding 'right to be a candidate' in an election.')." Def.'s Mem. 11. The City is intentionally missing the point, or attempting to distract this Court from the central issue—that it *is the voters' rights* that are stake here and they are directly adversely impacted by the implementation of Local Law #15.

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of the State's goals and only if no grounds can be conceived to justify them," misstates the law. Def.'s Mem. 11 (quoting *Clements*, 457 U.S. at 963).

The City's reliance on decisions upholding "qualification laws" is similarly misplaced. The City relies on court decisions upholding term limits (*Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009)), laws prohibiting elected officials from retaining office while running for a different office (*Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980)), and laws imposing residency requirements (*Scavo v. Albany Cnty. Bd. of Elections*, 131 A.D.3d 796 (3d Dep't 2015); *Adamczyk v. Mohr*, 87 A.D.3d 833 (4th Dep't 2011)). Def.'s Mem. 11. However, those cases themselves distinguish laws like Local Law #15 from the laws they uphold. In *Molinari v. Bloomberg*, the Second Circuit explicitly rested its decision to uphold a term limit law on the fact that term limit laws do not "involve direct restrictions on speech or access to the ballot," unlike laws that limit the amounts candidates can spend on their campaigns, that ban primary endorsements by political parties, and other such laws. 564 F.3d at 605, 604 n.10. In *Signorelli v. Evans*, the Second Circuit upheld a law prohibiting state court judges from running for other elected office because through such a law, "New York places no obstacle between Signorelli and the ballot or his nomination or his election. He is free to run and the people are free to choose him." 637 F.2d at 858. There was no infringement on the right to associate, because if *Signorelli* resigned his state court judgeship, he could run for any elected position he was otherwise qualified for.

Local Law #15 is fundamentally different from these laws. It permanently bans individuals from *ever* running for certain elected positions if they have *ever* been convicted of certain felonies, regardless of any other qualifications. This is the type of "direct restriction[ ] on

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… access to the ballot" that *Molinari v. Bloomberg* recognizes as violating the fundamental right of voters to associate with their chosen candidate. 564 F.3d at 604-5.

The only time voters' rights can be infringed is when there is clear and undeniable governmental interest that results in a narrowly-drawn, wholly defensible and internally consistent statute. Local Law #15 is nothing of the kind. It is not narrowly-drawn or internally consistent. It is retroactive; it bars persons from serving in office forever; it includes certain crimes but not others; and it completely undercuts itself by exempting individuals who have been pardoned.

Thus, despite the twists utilized by the City to deny the unambiguous constitutional jurisprudence regarding voters' First Amendment right to associate, this Court should not be misled into adopting wholly irrelevant arguments from wholly irrelevant cases.

IV. LOCAL LAW #15 IS PREEMPTED BY STATE LAW

In addition to its unconstitutionality, Local Law #15 is preempted by both field preemption and direct conflict, and is therefore invalid.

The City's arguments against preemption are misleading, and without merit. The City first argues that "[s]ilence by the State on an issue should not be interpreted as an expression of intent by the Legislature" (internal quotes omitted)." Def.'s Mem. 13. However, the State has been anything but silent on the topic of qualifications for public office: while Public Officers Law § 3 sounds like one small, discrete statute, it is not the "slender reed" that the City makes it out to be—rather, *Public Officers Law § 3 houses over one-hundred and seventy-five (175) subsections*, each laying out qualifications and exceptions to those qualifications. The comprehensive coverage of qualifications is a clear demonstration by the State that it intends to occupy the field through an extensive set of statutes spanning from sweeping requirements to

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ejected each such proposal, thereby making an active choice not to ban such individuals from running for public office.[6] This puts Local Law #15 directly at odds with the State's intentions.

The City finally fails to address the direct conflict that arises from the fact that while the State has time limits on its disqualifications for various convictions, Local Law #15 contains none. The unending duration of Local Law #15's reach thus bans people convicted of crimes forever, explicitly prohibited by Public Officers Law § 3.

Thus, the City has utterly failed in this argument as well. Both field and conflict preemption render Local Law #15 invalid.

V. LOCAL LAW #15 IS INVALID BECAUSE IT WAS ENACTED CONTRARY TO THE MUNICIPAL HOME RULE LAW AND NEW YORK CITY CHARTER

The Municipal Home Rule Law requires that any law that "changes the method of nominating, electing, or removing an elective officer" must be passed by a public referendum within sixty days from the law's adoption. MHRL § 23. The City attempts to distinguish Local Law #15 from this category of laws, relying on cases involving term limits. However, in the decisions upholding the term limit laws without referendum, the courts explicitly explained that term limit laws could be passed without referendum because they do not change "the method of nominating, electing, or removing an elective officer, or … the term of an elective office." *Benzow v. Cooley*, 12 A.D.2d 162, 164 (4th Dep't 1961), *aff'd*, 9 N.Y.2d 888 (1961); *Molinari v. Bloomberg*, 564 F.3d at 608-09.

As recently as last June, in *Fossella v. Adams*, Index No. 85007/2022 (Sup. Ct. Richmond Cnty. June 27, 2022), the City's non-citizen voting law was struck down (in addition to being ruled unconstitutional and preempted by state law) because no referendum was held. The non-

[6] *See* Plaintiffs' Memorandum of Law, ECF Doc. # 6 at 14, n.14, filed March 31, 2023.

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citizen voting law changed the method of nomination and election by adding to the voter rolls and thereby affecting electoral outcomes. *See also Mayor of City of Mount Vernon v. City Council of City of Mount Vernon*, 87 A.D.3d 567, 568 (2d Dep't 2011) (affirming a decision that a local law abolishing and creating local offices was invalid for lack of referendum). Adding a public office qualification similarly impacts electoral outcomes by restricting voters' abilities to associate and vote for affected candidates, and changes the method of nominating an elective officer by changing how one qualifies to be nominated, thus requiring a referendum. *See also Barzelay v. Bd. of Sup'rs of Onondaga Cnty.,* 47 Misc. 2d 1013, 1015 (Sup. Ct. Onondaga Cnty. 1965) (a "change in the boundaries of wards from which members of the County Board of Supervisors […] are elected" requires a referendum.).

VI. CONCLUSION

For the foregoing reasons, the Court should declare Local Law #15 invalid and permanently enjoin its enforcement.

Dated: New York, New York
May 8, 2023

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify that this Memorandum complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. In determining compliance, I relied on the word count of the word-processing system used to prepare the document. The total number of the words in this Memorandum, exclusive of the caption, table of contents, table of authorities and signature block is 4,186 words.

Date: May 8, 2023
New York, New York

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Writing Sample
Samantha Mehring

I completed this hypothetical petition for a writ of certiorari for a course I took in Spring 2021, Constitutional Litigation. The petition is based on the case *United States v. Weaver*, 975 F.3d 94 (2d Cir. 2020), *vacated on reh'g en banc*, 9 F.4th 129 (2d Cir. 2021). At the time of the course, the case was pending rehearing en banc in front of the Second Circuit Court of Appeals. For the purposes of the class, we disregarded the pending rehearing and instead crafted a petition for a writ of certiorari to the Supreme Court of the United States. I did not receive any outside edits or feedback on this writing sample.

No.

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

CALVIN WEAVER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether, for Fourth Amendment purposes, a search begins once there is physical contact of a person; or whether a search begins when a police officer forms the subjective intent to search an individual.
2. Whether the *Terry* weapons frisk exception to the Fourth Amendment is satisfied when there is suspicion that an individual is armed and dangerous, but there exist other possible explanations for the individual's behavior.

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PETITION FOR A WRIT OF CERTIORARI

The United States respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 975 F.3d 94. The opinion of the district court is unreported, but can be found at _.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

This case presents two important questions of Fourth Amendment law: when a search has begun within the meaning of the Fourth Amendment, and what standard must be satisfied to establish reasonable suspicion that an individual is armed and dangerous so as to fall under the *Terry* weapons frisk exception to the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968).

According to this Court's cases, a search begins within the meaning of the Fourth Amendment

upon "the mere grasping or application of physical force with lawful authority." *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citations omitted). Additionally, this Court has held that police officers may conduct protective frisks as long as they possess a reasonable belief that a suspect may be armed and dangerous, even when the suspect's conduct is "ambiguous and susceptible of an innocent explanation." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

The Second Circuit, breaking with this Court's precedents, considered the subjective intent of Officer Jason Tom, and found that a search had begun "no later than" when he directed Calvin Weaver to assume an "in search" position, because his intention in giving those instructions was to conduct a search, even though no physical contact had yet occurred. *United States v. Weaver*, 975 F.3d 94, 101 (2d Cir. 2020). Furthermore, the Second Circuit held that even though Weaver's actions were "equally consistent with" carrying a firearm, Officer Tom did *not* have reasonable suspicion that Weaver was armed and dangerous. *Id.* at 103.

This Court's review of these questions presented is of great importance. When a search begins within the meaning of the Fourth Amendment determines the point at which a police officer must have established reasonable suspicion that a suspect is armed and dangerous, determining whether or not the search will fall into the *Terry* weapons frisk exception to the Fourth Amendment. Furthermore, determining what standard must be met to establish reasonable suspicion is essential to determining the protections and limits of the Fourth Amendment.

STATEMENT

At dusk on February 15, 2016, Officers Tom, Qonce, and Staub of the Syracuse Police Department were patrolling a high-crime area on the west side of Syracuse. *Id.* at 97. The officers noticed Calvin Weaver walking along the street curb and, as they drove past, he "stared into [their] vehicle, continued to stare, as [they] approached, as [they] passed, and continued to stare as [they] proceeded past him." Brief for Appellee at 4, *United States v. Weaver*, 975 F.3d 94 (2d Cir. 2020) (No. 18-1697). Officer Tom categorized Weaver's stare as "suspicious" and "odd." *Id.*

The officers observed as Weaver continued to walk towards a gray sedan and "adjusted his waistband." *Id.* Officer Tom explained that the adjustment was "just a subtle tug of [Weaver's] waistband, like an upward tug motion." *Weaver*, 975 F.3d at 97. Weaver entered the gray sedan, sitting in the front passenger seat, and the car drove away. *Id.*

The officers continued to drive, and again saw the gray sedan, this time driving on Davis Street. *Id.* The driver of the gray sedan stopped at a stop sign and only then activated his right turn signal. *Id.* The driver's failure to signal before the stop sign violated New York Vehicle and Traffic Law, which requires vehicles to signal 100 feet prior to a turn. N.Y. VEH. & TRAF. LAW § 1163(b) (Consol. 2021). The gray sedan then made two quick turns in succession. *Weaver*, 975 F.3d at 97. At that point, the officers followed the vehicle, turned on their emergency lights, and pulled the sedan over to the side of the road. *Id.*

As soon as the sedan pulled over, the rear door swung open into traffic, as if the passenger in the

backseat was trying to flee the vehicle. *Id.* The passenger complied with Officers Qonce and Tom's directions to stay in the car. Brief for Appellee at 5, *Weaver*, 975 F.3d 94 (No. 18-1697). Officer Tom saw Calvin Weaver sitting in the front passenger seat, and as he approached the vehicle, he saw Weaver pushing down on his waistband area with both hands, squirming and shifting his hips as though he was pushing something down. *Weaver*, 975 F.3d at 97. In an affidavit, Officer Tom explained that "[b]ecause I observed Weaver moving his hands around his waist and pelvis while shifting his hips, I believed he may have been in possession of a weapon." Brief for Appellee at 16, *Weaver*, 975 F.3d 94 (No. 18-1697).

Weaver showed Officer Tom his hands and put his hands on his head in compliance with the officer's instructions, exclaiming, "I don't got nothin'." *Weaver*, 975 F.3d at 97. Weaver then followed Officer Tom's instructions to get out of the car, put his hands on the trunk, and spread his legs apart. *Id.* at 98. However, Weaver was standing very close to the trunk of the car, so Officer Tom asked him to step back. *Id.* Weaver took a small step away from the trunk. *Id.*

As soon as Officer Tom began to pat Weaver's waistband area, Weaver "immediately" stepped forward and pressed his waist against the trunk, preventing Officer Tom from frisking Weaver's waist area. *Id.* Again, Officer Tom asked Weaver to take a step back, and Weaver did so, while remarking that it was slippery. *Id.* Officer Tom then placed Weaver the distance away from the car he needed to be so that Officer Tom could conduct the pat frisk. *Id.* Officer Tom started to pat frisk Weaver again, and

again Weaver pushed his waist area against the trunk. *Id.*

At that point, Officer Tom handcuffed Weaver so that he could effectively pat frisk his waist and front pockets. *Id.* Officer Tom felt a "slight small bulge" in Weaver's pocket, which he correctly predicted to be a narcotic – he retrieved baggies filled with a white powdery substance that field tested as cocaine. Brief for Appellee at 8, *Weaver*, 975 F.3d 94 (No. 18-1697).

Officer Tom continued his pat frisk, and felt "something hard," which he again correctly predicted – this time, to be a barrel of a firearm. *Weaver*, 975 F.3d at 98. Officer Qonce finished conducting the pat frisk, and, also feeling the barrel of the firearm, he unzipped Weaver's pants and the button of his long johns to remove a loaded semi-automatic pistol. *Id.*

On August 31, 2017, Calvin Weaver was charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 992(g)(1), one count of possession of a firearm with a removed serial number in violation of 18 U.S.C. § 922(k), and one count of simple possession of a controlled substance in violation of 21 U.S.C. § 844(a). *Id.*

Weaver moved to suppress the pistol as the fruit of an unconstitutional search, asserting that the officers did not have reasonable suspicion to pat frisk him during the traffic stop. *Id.* The district court denied Weaver's suppression motion, holding that the officers had reasonable suspicion to conduct a pat-down frisk. *Id.*

In a split-panel decision, the Second Circuit reversed the district court's denial of Weaver's motion to suppress, holding that Officer Tom lacked reasonable suspicion that Weaver was armed and

dangerous. *Id.* at 96-97. The majority ruled that the search began "no later than the moment when Officer Tom directed Weaver to assume [the] 'in search' position." *Id.* at 101. Accordingly, the majority reasoned that "[i]t is at that point that Officer Tom must have had an articulable and objectively reasonable belief that Weaver had something dangerous." *Id*. Considering the actions that occurred before that point, namely Weaver's staring at the unmarked police car, his adjustment of his waistband while walking, his statement "I don't got nothin'," and his pushing down on his waistband area with both hands while squirming and shifting his hips, the majority concluded that this was not enough to establish reasonable suspicion. *Id.* at 102-03. The majority did not consider in its decision the facts that the traffic stop took place in a high-crime area and that the vehicle's rear door opened up into traffic as soon as it pulled over, claiming that such bases of reasonable suspicion were "meritless." *Id.* at 105 & n.10.

The majority held that Weaver's actions did not establish reasonable suspicion that he was armed and dangerous because his "actions were equally consistent with the act of secreting drugs or other nonhazardous contraband," and "we cannot say that an objectively reasonable officer who witnessed such an action would conclude that Weaver carried a firearm." *Id*. at 103.

REASONS FOR GRANTING THIS PETITION

A. The decision below directly conflicts with the rulings of other Circuits

The decision below departs from several other circuits in its determinations of when a search begins

within the meaning of the Fourth Amendment and when a *Terry* weapons frisk exception to the Fourth Amendment is satisfied.

The Tenth, Fourth, and Seventh Circuits hold that a search does not commence upon a police officer's orders made in preparation of a frisk, but instead when the officer comes into physical contact with the individual. The Second Circuit held differently in the case below, announcing that a search begins as soon as an officer issues a command with the purpose of undertaking a search.

The Third, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Courts of Appeals hold that the existence of other plausible explanations for an individual's behavior does not mean that an officer cannot have reasonable suspicion that the individual is armed and dangerous, satisfying the *Terry* weapons frisk exception to the Fourth Amendment. The Second Circuit, in contrast, held in the case below that "conduct consistent with, or possibly suggestive of, weapon possession [does not] satisf[y] the reasonable-suspicion standard." *Weaver*, 975 F.3d at 106.

Because the decision below drastically departs from the other circuits' holdings in these two respects, it warrants review.

1. Many Circuits hold that a search begins once there is physical contact within the meaning of the Fourth Amendment

In conflict with the decision below, the Seventh Circuit has "deemed a frisk not to have begun until the officer actually placed his hands on

the defendant." *United States v. Snow*, 656 F.3d 498, 503 n.1 (7th Cir. 2011); *see also United States v. Tinnie*, 629 F.3d 749, 753 & n.3 (7th Cir. 2011). Under that standard, a search does not begin until there is physical contact between the police officer and the individual being searched, regardless of the police officer's subjective intent. The Tenth and Fourth Circuits as well as the Supreme Court of New Jersey have also adopted this objective touch-based bright-line rule. *United States v. Gurule*, 935 F.3d 878, 885-86 (10th Cir. 2019) ("[E]ven if the officers intended to frisk Gurule after he was on his feet, that does not matter for our analysis…the search did not commence until the officer physically manipulated Gurule's right-front pocket."); *United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (rejecting that the frisk of the suspect began when "officers had made the decision to pat him down"); *State v. Smith*, 134 N.J. 599, 621 (1994) ("The lack of a bright-line rule [such as 'a frisk begins when an officer lays hands on a suspect'] in stop-and frisk cases places police officers in a precarious position. Sometimes in a matter of seconds, an officer must determine whether a protective pat-down is necessary to secure his or her safety.").

There is little question that the inception of a search would be deemed the time of physical contact if this case had arisen in the Seventh, Tenth, or Fourth Circuits, or in the state courts of New Jersey. In any one of those other jurisdictions, the courts would have concluded that the search began when Officer Tom physically touched Weaver, not when Officer Tom ordered Weaver to exit the vehicle and put his hands on the trunk.

2. At least seven Circuits hold that there is reasonable suspicion that an individual is armed and dangerous even if there are other plausible explanations for the individual's behavior

Several circuits have interpreted this Court's precedents to mean that a police officer does not need to rule out other explanations for an individual's behavior, innocent or otherwise, in order to conclude that there is reasonable suspicion that the individual is armed and dangerous. In *United States v. Brown*, the D.C. Court of Appeals explained that "[a]s the Supreme Court has made clear, that an individual's conduct is 'ambiguous and susceptible of an innocent explanation' does not mean that it may not be grounds for suspicion: '*Terry* recognized that…officers could detain [such] individuals to resolve the ambiguity.'" *United States v. Brown*, 334 F.3d 1161, 1168 (D.C. Cir. 2003) (quoting *Wardlow*, 528 U.S. at 125-126).

The Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have also adopted that interpretation of this Court's decision in *Terry*. *See United States v. Graves*, 877 F.3d 494, 499 (3d Cir. 2017) ("Graves advances innocent explanations for all his conduct and points to other evidence undercutting the likelihood that he was engaged in criminal activity. However, the mere possibility of such an innocent explanation does not undermine Officer Simmons' determination at the time."); *United States v. McCoy*, 513 F.3d 405, 413-415 (4th Cir. 2008) (holding that a police officer had the requisite reasonable suspicion under *Terry* to detain and frisk a suspect because the officer suspected that

the individual had just conducted a drug deal); *United States v. Miranda-Sotolongo*, 827 F.3d 663, 669 (7th Cir. 2016) (citing *Wardlow*, 528 U.S. at 125) ("Reasonable suspicion…does not require the officer to rule out all innocent explanations of what he sees. The need to resolve ambiguous factual situations – ambiguous because the observed conduct could be either lawful or unlawful – is a core reason the Constitution permits investigative stops like the one at issue here."); *Chestnut v. Wallace*, 947 F.3d 1085, 1088 (8th Cir. 2020) ("To detain someone temporarily, officers need only reasonable suspicion that criminal activity is afoot based on attendant circumstances. The inquiry…need not rule out innocent conduct."); *United States v. McHugh*, 639 F.3d 1250, 1256 (10th Cir. 2011) ("[W]e need not rule out the possibility of innocent conduct, and reasonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality."); *United States v. Reed*, 402 F. App'x. 413, 416 (11th Cir. 2010) ("Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation…*Terry* recognized that the officers could detain the individuals to resolve the ambiguity.").

Only this Court can resolve this conflict about the standard that is required for a police officer to overcome the protections of the Fourth Amendment and search a potentially armed and dangerous individual. The decision of the court below is a marked departure from the consensus of other courts, and that departure, if allowed to stand, will profoundly curtail the ability of police officers to protect themselves in high-risk situations.

B. The Second Circuit's rule is wrong

1. The inception of a search is an objective inquiry, measured by when an officer physically contacts an individual

The court below erred in rejecting the longstanding and nearly unanimous holding of other courts that a frisk does not begin until a police officer makes physical contact with the individual for purposes of the Fourth Amendment.

This Court has defined a frisk as "a limited search of the outer clothing for weapons," *Terry*, 392 U.S. at 24, "not as a directive to put one's hands on the hood of a car." *Weaver*, 975 F.3d at 113 (Livingston, C.J., dissenting); *see also Frisk*, Black's Law Dictionary (11th ed. 2019) (defining "frisk" as "[a] pat-down search to discover a concealed weapon"). The Court's definition emphatically excludes "safety-related directives issued during the course of a lawful stop – directives involving no…physical contact." *Weaver*, 975 F.3d at 113 (Livingston, C.J., dissenting).

In *Pennsylvania v. Mimms*, this Court determined that "once a vehicle has been lawfully stopped, its driver may be ordered to get out of the car because, when assessed against the hazards faced by police in such encounters, this intrusion, far from being a frisk, *is not even a Fourth Amendment event*." *Id.* (emphasis in original) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)).

In direct contrast with this Court's precedents, the decision below held "that Officer Tom had effectively initiated a search of Weaver when he instructed him to place his hands on the trunk with legs spread apart…because there is no other reason

in our view to ask Weaver to assume this position. A frisk is a search." *Id.* at 101 (majority opinion). That holding ignores this Court's definition of the inception of a search and is not supported by any precedent.

The court below held that the search began when Officer Tom directed Weaver to assume the "in search" position because that is when Officer Tom formed the subjective intent to search Weaver. *Id*. at 102. The majority argued that "precedent permits it to consider Officer Tom's subjective intent, despite Fourth Amendment precedent disfavoring this approach, so long as it does so only in determining *when* the [frisk] was initiated." *Id.* at 114-115 (Livingston, C.J., dissenting) (emphasis in original) (internal citations omitted). However, as the *Weaver* dissent maintains, "[t]here is no authority for this proposition…The Supreme Court…has made clear that outside a narrow range of cases not relevant here, it is simply 'unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *Id.* at 115 (Livingston, C.J., dissenting) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

This Court has held that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *see also Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (explaining that the Supreme Court has "repeatedly rejected" the subjective approach to determining whether the Fourth Amendment has been violated).

The decision below misconstrues the test for determining when a search begins for purposes of the

Fourth Amendment, both by characterizing a contact-less directive as the beginning of a search and by considering the police officer's subjective intent, which this Court has expressly forbidden. Because so much turns on the question of when a search begins within the meaning of the Fourth Amendment, this Court should grant review to ensure even-handed administration of the Fourth Amendment.

2. Terry does not require a police officer to rule out other plausible explanations

The Second Circuit's majority opinion purported to give police officers the flexibility to not rule out all other plausible explanations before concluding that there is reasonable suspicion that a suspect is armed and dangerous. However, the result that the majority reached in this case is in direct contrast with that approach. Finding that "Weaver's actions were equally consistent with the act of secreting drugs or other nonhazardous contraband [and carrying a weapon]," the court below held that there was not adequate evidence to support a reasonable suspicion that Weaver was armed and dangerous. *Weaver*, 975 F.3d at 103.

As Chief Judge Livingston explains in dissent, "*Terry*…does not limit protective frisks to circumstances in which the officer *knows* that a suspect is armed and dangerous, but permits frisks based on the reasonable belief that a suspect *may* pose such a threat, even when the suspect's conduct is 'ambiguous and susceptible of an innocent explanation.'" *Id.* at 111 (Livingston, C.J., dissenting) (emphasis in original) (citations omitted) (quoting

Wardlow, 528 U.S. at 125). The fact that Weaver's actions were equally consistent with carrying drugs also means that "Weaver was *just as likely* secreting a weapon or other dangerous instrument. *Id.* at 117 (Livingston, C.J., dissenting) (emphasis in original) (internal citations omitted). To hold that there was no reasonable suspicion because Weaver's actions were consistent with carrying drugs in addition to carrying a weapon destroys the reasonable suspicion standard that this Court has established. The level of suspicion required to satisfy reasonable suspicion is "considerably less than…a preponderance…and obviously less than is necessary for probable cause." *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Applying this well-established standard, at least seven other courts of appeals would find that Officer Tom had reasonable suspicion to frisk Calvin Weaver for his protection and the protection of the other officers.

To ensure that police officers can comply with constitutional rules, courts can administer those rules, and citizens can be protected by them, this Court should grant review to correct the lower court's error and restore national uniformity on this important issue.

C. The questions presented are important

Proper resolution of the questions presented is a matter of incredible importance warranting this Court's review. At what point a search begins and what standard is required to establish reasonable suspicion that a suspect is armed and dangerous are essential components to determining what the Fourth Amendment protects and what it does not.

Confusion over these questions threatens the rights of defendants as well as the ability of police officers to perform their duties when they lack clear guidance as to when the Fourth Amendment is implicated.

The disparate holdings of the Second Circuit and virtually every other circuit court on the question of when a search begins within the meaning of the Fourth Amendment "threatens to sow confusion in an area of law pursuant to which police officers must often make quick judgments in tense situations as to whether they have a lawful basis to proceed." *Weaver*, 975 F.3d at 116 (Livingston, C.J., dissenting) (citation omitted).

To allow interpretation of the Fourth Amendment to hinge on the subjective intent of police officers, as the lower court does, would be "to send police and judges into a new thicket of Fourth Amendment law," which this Court explicitly stated it was "unwilling" to do in *Arizona v. Hicks*. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

Furthermore, requiring that officers conclude that an individual's behavior is consistent with being armed and dangerous to the point of overcoming any other plausible explanation for the behavior is unworkable in practice and needlessly dangerous to police officers.

The Second Circuit's decision conflicts with the holdings of other courts of appeals, misapprehends this Court's precedents, and is unworkable in practice. This case presents a clear vehicle to decide two critical questions of Fourth Amendment law. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 7, 2021